

R E P O R T S
OF
Cases
HEARD IN
THE HOUSE OF LORDS,
ON
APPEALS AND WRITS OF ERROR;
AND DECIDED
DURING THE SESSION
1819.

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BARRISTER AT LAW

VOL. I.

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1823.

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P R E F A C E.

IT is now twelve years since the Editor of these Reports began to take notes of the arguments and judicial opinions delivered in Appeal Cases in the House of Lords. Many causes have concurred to delay the publication of the matter collected in the course of his attendance since the year 1811. The want of experience, and the fear of intruding upon the public an unfaithful or unworthy memorial of those important decisions which (judicially) constitute irrevocable law, were not least or lightest of the motives for pause and deliberation. But the sudden appearance of other Reports surprised the Editor, in the midst of his doubts, adding accumulated weight to existing objections; and if he could have satisfied himself as to his competency for the arduous duties of a Reporter, he felt an invincible repugnance to enter into a com-

petition which was at once useless to the public, and degrading to his profession.

After the appearance of these unanticipated Reports, the half formed design of publication was suspended ; but the Editor continued his labour of collection and private record with a view to future contingencies. The discontinuance of the former Reports, as unexpected as their commencement, and applications on the part of the bookseller, led to a renewal of the suspended project of publication.

Into the general question of the use and abuse of law reports the Editor is unwilling to enter, although his mind is not unaffected by the common desire to have the reputation of being engaged in a useful occupation. If law, having attained its perfection as a science, is stationary ; if being exempt from the condition of all human things, it is unaffected by the impression of external circumstances, and yields nothing to the change of manners and opinions, or to the more pressing exigency of the necessities of human intercourse, Reports are now, and have for many ages been, useless. But if new rules of law arise out of new

combinations of fact ; if old rules are modified or changed for the purpose of being adapted to the corresponding changes of society ; if there is, among the doctrines of law, sufficient uncertainty to admit of a latitude and diversity of opinion among those who preside in the courts of judicature and administer the law ; these are matters fit to be known, and of too much practical importance, in the administration of human affairs, to be overlooked or neglected ; for they may concern the life, the fame, and the fortune of every individual in society. In this view Reports have a definite use ; whether they are to be considered as monuments of the law, as materials for essayists, or as the fleeting indices of variations in the judicial atmosphere.

Reports of cases settled by frequent adjudication, of decisions incapable of application, and even of new cases incumbered with unnecessary details of facts, arguments and opinions, which add much to the bulk, the intricacy and expense of the work, and nothing to its value, will hardly require the censure of the critic. The apparent inutility of such works must speedily bring them to the level

of their demerits. The essence of such Reports, if any they contain, is soon extracted from the mass by those who are not slow to avail themselves of labours of Reporters ; and the Reports themselves, when they become useless, may be neglected. The serious evils therefore, which by speculative persons seem to be apprehended from the accumulating number of Reports, are little better than phantoms of the imagination. There is one practical answer to the complaint and cry of danger, which may satisfy common sense, though it fails to quiet the apprehensions of the theoretical objector: Reports will be published, bought and digested as long as they are found to be useful; and when they cease to be so, they will be thrown aside and sleep with the folios of polemic divinity, harmless and forgotten in the dust of undisturbed libraries.

The purchaser in the abstract, having no view to present use, naturally complains of prolixity, which adds to expense without an equivalent. The student sees, with dread, continued addition to the labour of a mind already overcharged; and the minister of law, whose notions are settled, is prone to repose

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on his acquired stores of knowledge.—But it has been observed, that the ground of objection occasionally changes with the circumstances and condition of the objector. As a mere purchaser the practitioner would be satisfied with the briefest abstract of the decisions of the Courts ; but when a case occurs in his practice, where he wants authority to remove his doubts, to confirm his opinion, or to support the cause of his client, then the complaint most familiar to the ears of those who are accustomed to courts of justice is, that the case resorted to as an authority is much too briefly reported,—that material statements of fact, pleading, argument and decision are omitted ; and the same report which before was deemed burthensome, because it contained too much of matter, is now reviled as negligent and worthless, because it contains too little. In the midst of these conflicting objections the task of Reporters is neither easy nor enviable.

The cases which the Editor has undertaken to report, cannot fall under that speculative censure which condemns the labour of the Reporter as useless or pernicious. These cases record the decisions of a tribunal where the errors of inferior courts are corrected,

where new law is established or old law restored ; or where fluctuating law and the conflicting decisions of the inferior courts, are settled or reconciled. The judgments of that ultimate tribunal furnish unalterable rules to the inferior ministers of the law, by which the rights of property are to be affected and administered, and the Reports consist principally of cases in which the judgments of the inferior courts have been reversed or altered.

Of such decisions the public cannot be ignorant with safety ; and in that view of the utility of his labours, so far as regards the subject matter, the Editor reposes with confidence. In the collection and compilation of that matter, the danger of mistake and failure is infinite. How much of that which has been rejected ought to have been retained,—how little has been thrown out of a mass of matter which might have been more carefully sifted,—to what extent the power of compression might have been carried,—it is not for him but for the public to determine. He can only suggest, that the unremitted attention required in amassing the matter, in digesting, compressing, selecting, revising, and above all, the study not to omit any material fact which

forms an ingredient of the judgment, and is part of the landmark to future decision, constitutes a severity of labour which none but those who have condemned themselves to that penalty, by a voluntary sentence, can easily conceive. It is a labour which may be useless to the world, but if it be so, it is worse than useless to the labourer; for it yields neither pleasure nor profit in proportion to the task.

The present volume comprises a selection of the cases decided in the session of 1819. Some of the cases which belong to that session have been omitted for the present, and reserved for future deliberation. These, with the unpublished cases of former years, may hereafter be collected in a separate volume; a possible event, which the Editor deems it expedient to notice; since, in the variety of censure to which reporting is exposed, the omission of cases is denounced as a serious offence. That, which in the judgment of one critic it would be almost criminal to publish, in the judgment of another it is a gross delinquency to omit.

The Editor has only to add, that he has endeavoured to exercise a sound judgment in the selection of the cases, and in the mode of compilation. He trusts also, that the high

judicial opinions which he has undertaken to report, are recorded * without error or material blemish.

From the profession in general, and many kind friends, whom he would name with respect and gratitude, if it could be done with their approbation, the Editor has received in the prosecution of his labours much of encouragement, and frequent assistance by the use of notes and documents.

To the profession, and those friends, he now makes, the only return they will permit, this public acknowledgment of their kindness ; and is pleased with the assurance, that, in their contemplation, the moral debtor who cherishes a due sense of his obligation stands at once indebted and discharged.

Lincoln's Inn,
May 10, 1823.

* In page 478 there is the appearance of mistake in the opinion expressed by the Lord Chancellor as to the powers of an English tenant in tail. The Report agrees with the note of the short-hand writer, and the sense in which the passage is to be understood will appear by considering the point of comparison between the Scotch tenant of tailzie and the English tenant in tail. In that sense it is accordingly abstracted in the Index under the Title "Power".

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REPORTS OF CASES

HEARD IN THE

HOUSE OF LORDS,

UPON APPEALS OR WRITS OF ERROR,

And decided during the Session, 1819.

59 GEO. III.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION
(FIRST DIVISION).

Lady ESSEX KER, and Lady MARY } *Appellants.*
KER }

JOHN WAUCHOPE, Esq. Writer to }
the Signet; the Rev. CHARLES } *Respondents.*
BAILLIE; Sir WILLIAM SCOTT, of }
Ancrurn, Baronet; and Sir HENRY }
HAY M'DOUGALL, Baronet }

A. by a testament made on death-bed, bequeaths all his real and personal estates in trust to be sold. The interest of the residue he directed to be paid to B. and C. his heirs-at-law and next of kin, during their lives, &c. The principal of the residue he gave to D. &c. B. and C. reduce the death-bed disposition. The Court held that they could not claim the life-interest given to them, either under the testamentary instrument or as next of kin, for default of disposition. But that the deed not being ab-

Feb. 17, May
3, 1819.

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AND REPRO-
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solutely void, according to the law of Scotland, was properly admitted in evidence against them to shew the testator's intention, and that D. &c. the residuary legatees, must be compensated out of the life-interest, given to B. and C. for the disappointment occasioned by their act.

JOHN, the late Duke of Roxburgh, by a testamentary disposition, dated the 4th of October, 1790, conveyed his whole unentailed real estate, and his personal estate, to himself, and his heirs whomsoever of his body, whom failing, to the Appellants equally between them and the heirs of their bodies; and failing either of them, to the survivor and the heirs of her body; whom failing, to his heirs of tailzie succeeding to the Earldom and estate of Roxburgh, under burthen of the payment of his debts and funeral expenses, and of all legacies which he might bequeath. On the 5th of November, 1803, the Duke executed another deed, whereby, without revoking the former for the better settlement of his affairs, in the event of his death, agreeably to the instructions given, or to be given by him, in relation thereto, he granted and disposed to the Respondent, John Wauchope, and to James Dundas, Clerks to the Signet, his whole unentailed real estate, (describing particularly all the lands and heritages he held in fee simple,) together with his personal estate, in trust, for the uses, ends, and purposes specified in the following words:—"To the end
 " that my lands, houses, and other heritages,
 " before conveyed, now belonging, or which
 " shall belong to me at my death, may be sold,
 " either in whole or in part, at the discretion of

“ my trustees; and that the produce and prices
 “ thereof may be applied to the purposes after-
 “ mentioned:—In the first place, for the pay-
 “ ment of my death-bed and funeral expenses,
 “ and of the expenses of management and exe-
 “ cuting this trust: Secondly, for and in pay-
 “ ment of all the just and lawful debts, which
 “ shall be owing by me at my death: Thirdly,
 “ for payment and satisfaction of all obligations,
 “ legacies, annuities, donations, or other be-
 “ quests granted, or to be granted, by me to
 “ any person or persons whatsoever, by any bond
 “ deed, missive, memorandum, codicil, or other
 “ writing whatsoever, expressive of my will and
 “ intention, executed at any time of my life,
 “ and even upon death-bed: And lastly, the
 “ whole residue, remainder, and surplus, of my
 “ said estate and effects, shall be conveyed
 “ and made over or applied and employed
 “ by my said trustees or trustee acting for
 “ the time, to and in favour of such person
 “ or persons, or for such uses and purposes, as I
 “ have directed, or shall direct, by any deed,
 “ missive, memorandum, or other writing, exe-
 “ cuted, or to be executed, by me to that effect.”

The trust disposition also, in the events of the
 trustees not accepting or declining to execute the
 trust, makes the following provision:—“ Then,
 “ and in either of these cases, the lands and
 “ other heritages and debts, and sums of money,
 “ and other *subjects* and effects, hereby dis-
 “ posed, shall fall and belong to such person or
 “ persons, and be applied to such uses and pur-
 “ poses as I have directed, or shall by any deed,

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“ missive, memorandum, codicil, or other writ-
 “ ing of the date hereof, or of any other date
 “ or dates, direct and appoint; and failing such
 “ appointment, then to the person or persons
 “ whom I shall appoint to be my residuary lega-
 “ tee or legatees.” By a subsequent clause, the
 trust-deed nominates the trustees, and failing
 them, the residuary legatees, to be the Duke’s
 executors and administrators of his estate and
 effects, excluding all others his nearest of kin
 and executors from these offices. By a writing
 executed at the same time with the last-men-
 tioned trust-deed, the Duke declared, “ That
 “ in the event of his sudden death, or in the
 “ event that he should be prevented from exe-
 “ cuting a deed of instructions, it was his will,
 “ that the deed which he formerly made in favour
 “ of the Appellants, should be carried into effect
 “ so far as regarded them.”

In the beginning of March, 1804, the Duke
 fell sick with the complaint of which he died.
 On the 19th of the same month, he executed
 an instrument, by which he directed the Res-
 pondent, John Wauchope, and James Dundas,
 as trustees named in the settlement of the 5th
 of November, 1803, to sell and dispose of his
 whole (unentailed) real estate in Scotland, and
 his house in St. James’s-square, London, and
 from the produce thereof, and of his personal
 estate, after payment of certain annuities and lega-
 cies in the deed specified, and of his debts, fune-
 ral charges, and expenses of management, he au-
 thorized them to invest the whole residue and
 remainder of the property thereby bequeathed,

in the public funds, or upon real security, in Scotland, and he thereby “ directed his trustees “ to pay annually the dividends and interest, “ equally between the Appellants; and failing “ either of them, to the survivor, during their “ lives, or that of the survivor; and upon the “ death of the survivor, to pay over the residue to “ Sir John Scott, (father of the Respondent, Sir William Scott,) and the Respondents Charles Baillie “ Hamilton, and Sir Henry Hay M‘Dougall, and “ their executors and assignees, in the proportions “ therein specified.” The Duke died without issue upon the day on which this last mentioned instrument was executed, leaving the Appellants his heirs-at-law and sole next of kin. Immediately after his death, the Appellants brought an action in the Court of Session, to reduce this deed; and obtained a judgment, by which it was found, that being executed on death-bed, it was inept, so far as it conveyed lands; in consequence of which, the deed was set aside, and the Appellants’ right to the lands, as heirs-at-law, established upon appeal to the House of Lords.

After a lapse of some years, the Respondent Wauchope, who alone had accepted and acted in the trust, brought an action of multiple-poincing, for the purpose of ascertaining, judicially, the respective rights of the parties claiming adverse interests in the trust-fund remaining in his hands. When the cause was brought before the Lord Ordinary, he ordered the parties to state their respective claims in writing. The Appellants claimed a life-interest in the residuary personal estate in the precise terms of the trust-deed; or

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if the Court should be of opinion, that, having rejected and annulled that deed in one respect, they could not avail themselves of any of its provisions, then, in the character of the Duke's *next of kin*, they claimed the profits of the residue of his property during their lives, and the life of the survivor, as a subject not disposed of by his will. On the other hand, the Respondents, Hamilton and M'Dougall and Sir J. Scott, insisted, that they were not only entitled to the capital of the funds after the death of the Appellants, and the survivor of them, but that they were entitled to the profits during the lives of the Appellants; upon the ground that the Appellants having reprobated the deed so far as it contemplated the disposal of land in Scotland, could take no benefit under that deed.

Upon these respective statements of claims, the Lord Ordinary, having heard Counsel, pronounced an interlocutor, by which, after reciting, to the effect before stated, the substance of the deeds dated the 14th of October, 1790, the 5th of November, 1803, with the writing or signed declaration of the same date, and the principal deed in question of the 19th of March, 1804; and after finding as facts the signature and execution of these several instruments, the action brought by the Appellants, and the consequent reduction of the deed made on death-bed, in so far as it related to the whole of the heritable subjects, expressed to be conveyed by it, which were descendible to the Appellants as heirs *alioqui successuræ*, under the titles thereof, which stood in the person of John, Duke of Roxburgh; the in-

terlocutor proceeds to find, " that the Appellants
 " having thus challenged and reduced the death-
 " bed deed, in so far as it affected the heritage,
 " cannot avail themselves of that deed, by claim-
 " ing the life-rent of the moveables under it :"
 and finally, it is found and declared, " That al-
 " though by the terms of the settlement, the re-
 " siduary legatees are entitled to claim the resi-
 " due of the effects vested in the trustees, after
 " the death of Ladies Essex and Mary Ker, (the
 " Appellants,) and the survivor of them; yet, that
 " the life-rent of these subjects *does not belong* to
 " the Ladies Ker *as the Duke's executors*, he
 " having appointed the trustees his executors,
 " and having appointed the whole residue of his
 " fortune to be paid at a certain period to the
 " residuary legatees, and therefore, the Ladies
 " Ker can have no legal claim to the life-rent of
 " these effects, except by this settlement, (the
 " trust-deed of the 19th of March, 1804,) which
 " they cannot approbate and reprobate; there-
 " fore, repels the claim of Ladies Essex and Mary
 " Ker, to the life-rent of the subjects in *medio*,
 " and *decerns* ; but before further answer as to
 " the claim of the residuary legatees, appoints
 " them to be heard on the question, Whether by
 " the terms of the Duke's settlement, as the resi-
 " due is declared not to be payable until after
 " the death of his sisters, they are entitled to de-
 " mand payment thereof immediately ? "

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Against this interlocutor the Appellants gave in a representation, by which, in addition to their former arguments, they contended, that John, Duke of Roxburgh, was domiciled in England ; and that

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his moveable succession must, therefore, be regulated by the law of England; which, as they represented, acknowledged no such principle as that applied to the case by the Lord Ordinary. Upon considering this representation, with answers, his Lordship pronounced the following interlocutor.

“ The Lord Ordinary having considered the representation, and the answers thereto, together with the whole process, in respect that the plea now maintained, as drawn from the English law, which it is said does not admit of the doctrine of approbate and reprobate, does not apply to this case, supposing the fact as to the law of England to be as there stated; seeing that John, Duke of Roxburgh, being a Scottish nobleman, and his whole landed property being in Scotland, and that being the place of his residence for the greater part of the year, his domicile must be held to have been in Scotland, notwithstanding his having, during the sitting of Parliament, an occasional residence in London, where he died; and in respect the pursuers *only claim* the life-rent in question of the residue of the Duke’s fortune, *by virtue of the deed* of 1804, which they have actually challenged, and set aside in part, refuses the representation, and adheres to the interlocutor complained of.”

The Appellants submitted these interlocutors to the review of the first division of the Court. But the Court adhered to the interlocutor of the

Nov. 28, 1815. Lord Ordinary. By another petition to the same
 Dec. 14, 1815. division, the Appellants reclaimed against the in-

terlocutor of the Court; but the prayer was refused, and the Court adhered to their former interlocutor. Against these several interlocutors, the present appeal was presented.

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For the Appellants—*Mr. Wetherell* and *Mr.* Arguments.

Abercrombie. The doctrine of *approve* and *reprobate* is not clear in application or principle. It has been treated as a result of *homologation*; as where a party has adopted an instrument and taken some benefit under it, he cannot afterwards question its validity; he must co-operate, if necessary, to effectuate all the provisions of that instrument. In *Gainer v. Cunningham* the decision turned upon very special circumstances. The case in question is different. According to the doctrine as it appears in the text writers on the law of Scotland—a party, an heir-at-law, as in this case, may avail himself of a deed in his favour, and at the same time challenge another deed of the same grantor, which, if duly executed, would deprive him of some legal right. The objection is admitted to be legal, when the instruments are on separate papers. If they happen to be united, then it is said, the party cannot *approve* and *reprobate*. Such distinctions in a system of law are singular. A case of this nature occurred in the year 1784. One Gordon made a will of his personal estate in favour of his heir-at-law: a few days after, he made an entail of his landed property in favour of the same person, but laying him under restrictions. The will and the entail referred to each other; and were indisputably meant as one settlement of the whole property of the testator

Fac. Die Jan.
17, 1758.

Not reported.

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and entailer. The heir-at-law took the personal estate under the will, and having afterwards challenged the deed of entail as executed on death-bed, it was contended, that he could not approbate and reprobate the same instrument, and that the two being executed *unico contextu*, were to be considered in that light. The judgment of the court was, that the heir, notwithstanding his having taken the personal estate under the will, might set aside the separate deed of entail. It was accordingly set aside, and he enjoyed both real and personal estate; the one as heir-at-law, without restriction, the other according to the terms of the will. This decision, if it proceeded upon a rational principle, would not have been different, although the deed of entail had been attached or annexed to the will, or formed part of it. The propensity of the courts below to extend this doctrine of *approbate* and *reprobate*, has been checked by this House, in the decisions upon *Wilson v. Henderson*, and *Crawford v. Coutts*. A deed made upon death-bed is not absolutely void, because the heir may waive his right, or his right may not be affected, in which case he is barred. But this deed, so far as it conveyed the inheritance, was challenged and reduced before the question of election was raised. — Is the right of heirs at law to give way to presumed intention? if so, where is the ground of presumption? The testator, when he framed or approved of the instrument, was capable of understanding the effect of his own acts; and if he intended to make his bequest conditional, he would have inserted an express condition. Suppose the deed to have

Mar. 29, 1802.

Mar. 14, 1806.

been so reprobated by the Appellants, that they can take nothing under it, then the life interest in the residue is not disposed of. It cannot fall into the residue for the benefit of the Respondents. They are not residuary legatees, but legatees in remainder of a residue. The executors cannot take it, they are mere trustees. To whom then can it go, but to the Appellants as next of kin? The deed is reduced, and cannot be read against them. *Hearle v. Greenbank*, *Sheddon v. Goodrich*.

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3 Atk. 714.

8 Ves. 497.

For the Respondents—the *Solicitor-General Sir R. Gifford*, and *Mr. C. Warren*. The principle of law which forbids a person to take a benefit from one part while he denies effect to another part of the same deed, is founded in natural equity, and confirmed by authority and practice. Every provision of a testamentary settlement operates as a condition. To defeat the provision, or to refuse the performance of the condition, excludes the recusant from the benefit of the will. The law will not admit of opposite and incompatible pretensions. The courts both of England and Scotland have adopted the maxim of the Roman law: “*Ab surdum videtur licere eidem partim comprobare*” “*judicium defuncti, partim evertere.*” Decisions grounded upon this principle have frequently occurred in the tribunals of Scotland: *Anderson v. Bruce*, *Morr. Dict.* p. 607. 21 Dec. 1680—*Patterson v. Spreuil*, *Kame’s Remarkable Decisions*, vol. ii. p. 114—*Cunningham v. Gainer*, Jan. 15, 1758. *Morr. Dict.* p. 617—*Gibson v. M’Bean*, *Id.* 620—*Martin v. Martin*. The case of *Loudon*

Ersk. Inst.
b. 3. t. 9. s. 10.

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lately decided in the Court of Session, illustrates and enforces the doctrine. The decision took place * under the following circumstances:—

“ *George Loudon*, who had been for some time resident, and died in Jamaica, had sent home 2,000*l.* sterling, of which 1,000*l.* was lent out upon heritable security. He executed a will in the English form, by which, *inter alia*, he directed his executors, so soon as Robert Loudon, his nephew, should attain the age of 21, to invest the sum of 5,000*l.* sterling in security upon property in Great Britain, for his use during the term of his natural life; and after his death, to the use of the heirs of his body; and he directed that the sum of 2,000*l.* which he had remitted to Great Britain, as above mentioned, might be applied in part payment of the said sum of 5,000*l.* sterling. He further directed his executors to invest the sum of 1,500*l.* sterling in good security, the interest or profits of which were to be paid to his brother William Loudon, during his life-time, and after his death, the principal was given to his children. The testator also appointed his nephew Robert Loudon his residuary legatee. William Loudon was the testator’s heir-at-law. For several years he continued to draw the interest of the 1,500*l.* given to him in life-rent, but having obtained information of the heritable bond for 1,000*l.* he contended that it was not carried by his brother’s testament, but

* 1811, Jan. 29, May 23, Dec. 10.—The case not reported.

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“ fell to him as his heir-at-law. This claim was
 “ met on the part of Robert Loudon the nephew,
 “ by the doctrine of approbate and reprobate;
 “ and he further maintained, that William Lou-
 “ don had homologated the settlement by taking
 “ benefit under it, having drawn for several years
 “ the interest of the 1,500*l*.—Lord Newton,ordi-
 “ nary, found that the heir-at-law had not done any
 “ thing sufficient to infer homologation, unless
 “ it could have been established that he had
 “ full knowledge of the contents of the settle-
 “ ment at the time when the alledged acts of ho-
 “ mologation were done. He sustained, however,
 “ the plea of approbate and reprobate to its full
 “ extent: For he found in the same interlocutor,
 “ ‘ that he (William Loudon), is not entitled both
 “ ‘ to approbate the will by accepting the bequest
 “ ‘ of the interest of 1,500*l*. and to reprobate it by
 “ ‘ challenging the conveyance of the above 1,000*l*.
 “ ‘ according to the purpose of the will; therefore
 “ ‘ ordains him to declare his option within ten
 “ ‘ days, whether he will take the interest of the
 “ ‘ 1,500*l*. provided to him and his family by the
 “ ‘ will, or claim the 1,000*l*. lent out on heritable
 “ ‘ security, but destined by the testator for an-
 “ ‘ swering the purposes of his will.’ This judg-
 ment was confirmed by two successive interlocu-
 tors of the court. The Appellants having
 challenged and reduced the death-bed disposition,
 so far as the heritage is bequeathed by it, those
 acts amount to an abandonment of the life-inter-
 est in the personalty created in their favour by
 the deed. That interest consequently, and of ne-

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cessity, falls to the enjoyment of the Respondents. If it can be supposed that these acts do not amount to an election, then it remains to be determined by the Appellants, whether they will take the life-interest in the mixed fund given by the testamentary instrument, and give up the unentailed real estate, or insist upon their legal right to the inheritance, and abandon the life-interest in the personalty. The Appellants must elect: They cannot *approve* and *reprobate*. This is not a case like those cited for the Respondents. The bequests are contained in one, not in two instruments. The law is different where the instruments are distinct; and this is a question of positive law, not of expedience or morality. It is argued, upon the authority of *Hearle v. Greenbank*, and *Sheddon v. Goodrich*, that the testamentary instrument as to land not having been legally executed, cannot be read to shew any intention upon the subject. Those cases may be distinguished from the present. In *Boughton v. Boughton*, it was decided by Lord Hardwicke, that a will not executed according to the *statute*, though void as to real estate, might be read to raise a case of election against the heir; because the condition was annexed to the gift of the personalty. In the case of copyhold, where no surrender has been made, although it cannot pass by a will, and no condition is expressed, yet, where the testator has given a legacy to the heir, and the copyhold to a stranger, the Court compels an election: *Pettiward v. Prescott*. The distinctions made in these conflicting cases are not satisfactory, and do not seem

3 Atk. 714.

8 Ves. 497.

2 Ves. Sen.
p. 12.

29 Car. 2.

7 Ves. 541.

to rest upon intelligible principles. The question was much discussed in the case of *Thelluson v. Woodford*, where the doctrine of election prevailed.

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The law of England may be doubtful on the point, but the law of Scotland, is clear and decisive. The case of *Cunningham v. Gainer* is an express decision upon the subject. In that case the testament was executed upon death-bed; yet the Court suffered it to be read, and in their judgment proceeded upon the principle of approve and reprobate. There was no appeal against that judgment. It has established the law upon the question. It has guided the courts ever since.

In the case of *Brodie v. Barry*, Sir William Grant, the late Master of the Rolls, expressing his doubts of the soundness of the distinction between express and implied conditions, decided that a will duly executed in the English form, by which estates in Scotland were devised to trustees, together with estates in England and personal property, might be read to raise a case of election against the heir, to whom a legacy was given by the will. In *Crawford v. Coutts*, there were two instruments, the latter executed on death-bed, containing a revocation of the former. No benefit was given to the heir by the invalid instrument, and he stood upon his independent right. The doctrine of *approve* and *reprobate* did not come in question, and the case

2 V. and B.
127. There
was no con-
dition ex-
pressed.

* 13 Ves. 211. where most of the cases *pro* and *con*, to be found in the Books of Report, are cited.

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is altogether inapplicable. In *Wilson v. Henderson*, the will contained no provision as to lands, and the death-bed disposition was a separate instrument.

Morr. Dict.
p. 605, 612.

The other cases, cited for the Appellants in the court below, contain no principle which can bear upon the present question. In some of those cases, such as *Weir v. the Laird of Lee*, and *Sir P. Home v. E. of Home*, it was decided that a party might produce in evidence an admission or statement of fact made in one part of a deed, without being bound to admit the truth of every other part of the same deed. In other cases adduced, of a different class, as those of *Gray and Somerville v. Abernethy*, and *Fee v. Traill*, where reservations had been unwarrantably made in conveyances by persons bound to execute them simply, it was found that parties intitled might avail themselves of the full benefit of the conveyances, refusing to acknowledge or effectuate the reservations. How do these decisions affect the doctrine of election?

Morr. Dict.
p. 609, 616.

But the Appellants if they cannot avoid election, resort to a new device; they would take the real estate as heirs, and the life interest in the residue of the personalty as next of kin. They argue that if they cannot have that interest under the will, there is no disposition of the life interest. They cannot claim it as next of kin. In fact, there is no intestacy. By a clause in the trust disposition of 1803, all *the subjects* thereby disposed are given, in default of appointment, to the person or persons whom the disponent should appoint to be

his *residuary legatee or legatees*. If he has not disposed of the life-interest in the personalty, it falls, by virtue of that clause, into the residue, upon the refusal of the Appellants to perform the implied condition of the will; as it would in case of their death, and the Respondents take it under appointment. Lastly, if the life-interest does not fall into the residue, it is a fund out of which the Respondents must be compensated for the disappointment occasioned by the acts of the Appellants. *Welby v. Welby*.*

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2 Ves. & Bea.
p. 90.

Mr. Wetherell in reply. In this case the question of election is not raised against the heirs; because the death-bed disposition being an invalid instrument cannot be read to shew any intention

* The report of the judgment pronounced in that case, by Sir W. Grant, contains the following passage:—"That an heir, to whom an estate is devised in fee, may be put to an election, although, by the rule of law, a devise in fee to an heir is inoperative, I should have thought perfectly clear, independently of Lord Cowper's decision in the case in *Gilbert*;† for, if the will is in other respects so framed as to raise a case of election, then, not only is the estate given to the heir under an implied condition, that he shall confirm the whole of the will, but in contemplation of equity the testator means, in case the condition shall not be complied with, to give the disappointed devisees out of the estate, over which he had a power, a benefit correspondent to that of which they are deprived by such non-compliance. So, that the devise is read, as if it were to the heir absolutely, if he confirm the will; if not, then in trust for the disappointed devisees as to so much of the estate given to him, as shall be equal in value to the estates intended for them."

† Anon. Gilb. Eq. Rep. 15.

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as to the land. The principle of the decisions in *Hearle v. Greenbank*, and *Sheddon v. Goodrich*, is founded in universal law,—it must extend to cases in Scotland.

The Judgment of the Court below is at all events defective in one respect. There has been no decision upon the question reserved, as to the life-interest in the personalty. The Judges of the Court of Session have pronounced that the Appellants are not to have it. But they have not said who is to have that interest which yet remains to be disposed of. The consideration of that difficulty might have altered or affected their judgment.

The Lord Chancellor,—after stating the principal facts of the case as the foundation of the Judgment, which he recommended for the adoption of the House, proceeded to this effect:

In this Case, according to the pleadings in the Court below, the Respondents, Hamilton, Scott, and M'Dougall, claim an immediate interest in the proceeds of the residuary fund of the personal estate. The Appellants make an adverse claim to the same subject, either under the deed of trust, or as next of kin, for default of disposition. From the language of the interlocutor, "*that the life rents do not belong to the Appellants, as the Duke had made the trustees his executors, and had appointed the whole residue of his fortune to be paid to the residuary legatees,*" it does not clearly appear, whether the Lord Ordinary meant to negative the claim of the Appellants as

next of kin. It is very true, that the Duke had appointed the trustees his executors, and had appointed the residue of his fortune to be paid to the residuary legatees; but that was not to take place until the death of the survivor of the Appellants. The conclusion, "*that, therefore, the Ladies Ker can have no legal claim to the life-rent of these effects, except by this settlement which they cannot approbate and reprobate, therefore repels this claim of Ladies Essex and Mary Ker to the life-rent of the subjects in medio,*" does not seem to be a complete judicial decision, nor a necessary conclusion from the premises.* Having repelled their claims, and having stated that the trustees were executors, the Lord Ordinary goes on to make a reservation upon certain questions which have not yet received the decision of the Court below. The question was, Whether the residuary legatees were, or were not, to have immediate payment of the residue? If the Appellants could not claim the life interest

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* The passage of the interlocutor to which these observations apply runs thus:—"Finds, &c. that the life-rent of the subjects does not belong to the Ladies Ker as the Duke's executors, he having appointed, &c. Therefore, &c." These words, if considered without reference to the words of the subsequent interlocutor, might be considered as a finding that the Appellants were not entitled as *next of kin*. For "the appellation of executors is sometimes applied *designative* to those who are barely entitled to the moveable succession of the deceased *ab intestato*, and have a right to claim the office of executors if they think fit." Erskine's Inst. B. 3. Tit. 9. § 1. So in the same author, B. 2. Tit. 2. § 3.—"*Next of kin, or executors,*" are coupled as synonymous denominations. In like manner the subject of moveable succession is called *executry*. Id. B. 3. Tit. 9. § 1.

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under the settlement, it must follow of course either that they had a right to claim it as next of kin, or if they were not at liberty to bring forward that claim, the profits of the residue must either belong to the trustees and executors, during the lives of the Appellants and the survivor, or it must accumulate during that period, and be paid over to the parties who, at the death of the survivor, were appointed to take the capital. If we are to understand the decision of the Court below according to the last of these suppositions, as the interest, and all accumulation of interest, must go to the Respondents, or their representatives, there would be no reason why they should not take the interest immediately, as well as the capital, at the death of the survivor of the Appellants. There is, however, no express declaration to this effect in this Judgment of the Lord Ordinary; unless, (as it is probable) he meant to decide, that there being a testamentary disposition under which the Appellants could not claim as legatees, they could not claim in any other right; and then reserving the question how this interest was to be disposed of, and when it was to be paid. In the second interlocutor of the Lord Ordinary, it is said, “The pursuers only claim the life-rent in “question of the residue of the Duke’s fortune, “by virtue of the deed of 1804;” whereas, the claim made in the pleadings is not only by virtue of the deed of 1804, but also as the next of kin of the Duke. The interlocutor in this respect, therefore, is not quite correct, unless it can be said, that as the life-interest in the residue was given

to them by the Deed of 1804, and all other persons were excluded by the effect of the provisions of that deed, the result of that exclusion, and the intestacy which ensued upon their incapacity to take as legatees, devolved the life-interest upon them, as a consequence of the bequest in the deed, and the circumstances attending it. In such a sense only can the claim of the Appellants be said to be made by virtue of the deed of 1804 only. In the petition to the first division of the Court of Session, reclaiming against these interlocutors of the Lord Ordinary, the claim as next of kin is distinctly brought forward again. The result of the discussions before the Lord Ordinary, and before the Court of Session, seems to me upon the whole to be a decision, that the Appellants had no title to the life-interest in the residue, either under the deed of 1804, or in the character of next of kin to the testator; but I do not perceive, that the Court of Session has disposed of the reservation which is contained in the interlocutor of the 17th of January, 1815, which appoints the question to be heard, whether the residuary legatees could take any thing till after the death of the survivor of Ladies Essex and Mary Ker, upon the general question raised in the pleadings.

I do not undertake a minute discussion of the arguments urged in this case; it will be sufficient to state the fundamental principle which ought to guide our decision. The deed in question, upon this appeal, is in the nature of a testament. It is equally settled in the law of Scotland, as of England, that no person can accept and reject the same instrument. If a testator gives his estate to A., and gives A.'s

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estate to B.; Courts of Equity hold it to be against conscience, that A. should take the estate bequeathed to him, and at the same time refuse to effectuate the implied condition contained in the will of the testator. The Court will not permit him to take that which cannot be his, but by virtue of the disposition of the will; and at the same time to keep what by the same will is given, or intended to be given, to another person. It is contrary to the established principles of equity that he should enjoy the benefit while he rejects the condition of the gift. I have not overlooked the distinction which has been pressed on the consideration of the House. It is said, if a will be made which is attested by three witnesses, and which, therefore, according to the statute, is a good will, to pass land; and, in the same will, a case of election is proposed, there the will being duly executed according to the statute, if the devisee will take the land of the devisor, according to the disposition, he shall not refuse to comply with the implied condition of making good the will in certain respects, where it cannot have effect under the will, without his assent and co-operation: that is the simplest case of election. But in a case like the present, where the will has made the land personal estate; and, in one part of that will, the land, is disposed of, and in another part, the personal estate: if the will is not executed according to the statute, it is no will of land: but, as a bequest of personalty does not require attestation, the will is good to that extent. What then is to be done as to the case of election? It is said, that because, as a will of land, it is abso-

lutely void, it is exactly the same as if it contained nothing as to land ; that it cannot be read to shew an intention ; and, therefore, cannot be viewed as an instrument proposing election. The distinctions upon this head of law appear to be rather unsubstantial. It has been held, that although a will containing dispositions of land be not duly executed according to the statute ; yet, if in the same will, personalty is given upon condition that the legatee convey the land ; in such case, in as much as the disposition of the personalty cannot be read, without reading at the same time the condition upon which it is given, the gift and the condition are inseparable ; and the case of election is raised, because the testator in the disposition, not of land, but of personalty, expresses and directs what is to be done. These are undoubtedly thin distinctions ; and a judge having to deal with them finds a difficulty in stating to his own mind, satisfactory principles on which they may be grounded. This was the opinion of a Judge* who has lately, to the regret of the profession and the public, retired from his judicial labours. I doubt whether the Court in which he so long administered justice will ever see a judge of greater ability and integrity. The opinion to which I allude is expressed in a recent case, where the Judge, having disburthened his mind of his sentiments as an individual, observes in conclusion, that whatever might have been the foundation of the distinction, he found it established, and therefore, in his judicial character, he could not, with propriety, travel

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beyond this question—Is the distinction applicable to the decision of the case before the Court? In such a conclusion, and upon similar grounds, I acquiesce: for long professional experience has convinced me that it is more beneficial to the community to adhere to imperfect or ineligible rules of law, which have been long established, than that each succeeding Judge should be at liberty, upon his own notions of expedience, to improve and unsettle the law. The distinction which I am now considering was promulgated by Lord Hardwicke, a Judge profound in legal knowledge. Since his time, men have enjoyed their property upon that established doctrine, and the traditional experience of the Courts does not furnish a wiser maxim than that which is contained in the short precept, *stare decisis*. I therefore shall only consider the question whether the doctrine of election is applicable to the case before the House. In *Brodie v. Barry*, the late Master of the Rolls applied the doctrine to the case of property in Scotland, as Lord Hardwicke had before done in the case of *Gainer v. Cunyngham*.* I have looked at the decree and the proofs as recorded in that case, and it appears to me from the result, that Lord Hardwicke was of opinion, that a Scotch instrument, though not good to make an effectual title to Scotch land, might be read to raise a question of election. There is a ground which may be represented as a solid ground to take a Scotch case out of the

* This case is not to be found in any of the books of English Reports. A note of it, extracted from the Register's Book, will be found at the end of this case.

distinction, which I have admitted to exist in English cases. A deed made upon death-bed is not absolutely void by the law of Scotland. In many cases it will regulate the title, notwithstanding the objection which the heir may raise against it. Until reduced to a nullity, it is only voidable, and may be read for the purpose of ascertaining the intention of the testator. I do not think it necessary to examine and discuss all the cases upon this subject. It may be sufficient to state my opinion that, according to the law of Scotland (perhaps more directly than in our law), the doctrine of election was properly applied to this case. According to this decision, if the Appellants set up their title as next of kin, an election would be made, but it would be made in a manner perfectly nugatory, if they are left at liberty to disappoint the intentions of the testator, as to the real estate; to abandon their rights under the deed, and to claim, in the character of next of kin, the life-interest in the personal estate which is not disposed of by the deed. But as the Appellants have in fact, to a certain extent, annulled the deed by judicial process, their election is thereby made to take nothing under that repudiated instrument. A question then arises, what is to become of the life-interest, which the Appellants cannot take, either as legatees, or as next of kin? In our courts we have engrafted upon this primary doctrine of election, the equity as it may be termed of *compensation*. Suppose a testator gives his estate to A. and directs that the estate of A., or any part of it, should be given to B. If the devisee will not comply with the provision of the will, the Courts

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of Equity hold that another condition is to be implied, as arising out of the will, and the conduct of the devisee ; that inasmuch as the testator meant that his heir-at-law should not take his estate which he gives A., in consideration of his giving his estate to B. ; if A. refuses to comply with the will, B. shall be compensated by taking the property, or the value of the property, which the testator meant for him, out of the estate devised, though he cannot have it out of the estate intended for him. Under these circumstances it does not appear to me that there is any ground for advising your Lordships, either to affect this interlocutor, as far as regards the question of approbation and reprobation of the deed, or as far as in construction it negatives the title of the Appellants as next of kin. It may be necessary to correct the language contained in this interlocutor, so as to show unequivocally what points are determined. The latter point the Court has not yet determined, namely, whether the Respondents, are, or are not, entitled to take their compensation, until the death of the survivor of the Appellants ; the Court below having given no opinion, it is impossible that we should give any opinion upon that point. It is for their determination in the first instance. The cause must, in point of form, be remitted, with a view to have that question decided. It appears to me very easy of solution. There are certain persons who, according to the expression and principles of our law, have a vested remainder in the capital. They have also, by way of compensation, a title to the life-interest, preceding that remainder in the fund. Having, therefore, the

See the minutes of the judgment at the end of the note subjoined to the case.

whole interest, I do not understand upon what ground it can be argued, that there ought to be an accumulation of the profits, until the decease of the survivor of the Appellants. If the Appellants have no right, and the Respondents have all the right, in the subject of litigation, why is it not to be applied immediately by way of compensation, upon the ground, that, the condition of the gift being rejected, the life estate did not form a part of the disposition ?

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The Case cited in the foregoing arguments and judgment under the name of *GAINER v. CUNYNGHAM*, appears in the Register's Book, under the following date and title.

Tuesday, the 31st day of July, 1750, between Mary Cunyngham, widow of Robert Cunyngham, Esq. deceased, and Susannah Cunyngham, an infant by the said Mary, her mother and next friend—Plaintiffs. Daniel Cunyngham, Esq., William Coleman the elder, Esq., William M'Dowall, and Drewry Ottley the elder, Esqrs., and Elizabeth Cunyngham—Defendants.

The Cause was originally heard on the 13th of April, 1749. The pleadings are shortly abridged from the abstract in the Register's Book. The bill states: That Robert Cunyngham, the Plaintiff Mary's late husband, being resident at Edinburgh, in Scotland, did, by a deed of disposition or gift of his own hand writing, dated the 17th day of July, 1741, in consideration of the friendship he had for the Plaintiff Mary, assign and make over unto her, by the name of Mary Gainer, all his lands of Craig, in Scotland, and his whole moveable estate therein particularly described, upon condition that the said Mary should be a tender nurse to him during his life, and take care of his family affairs; and also that she should not

at any time then after cohabit with Captain James Dalrymple, or be in his company, unless by accident; with a power for the said testator to revoke the said deed: and under these provisions the said Mary was to enjoy the said premises after the said testator's death, for her own life, and afterwards he gave the said premises unto the Plaintiff Susannah, by the name of Susannah Cunyngham, his god-daughter, an infant, under the care of the Plaintiff Mary, and the heirs of her body for ever; remainder to his sons Daniel and Charles Cunyngham, Esqrs. and their heirs for ever, and in the disposition and assignment, he obliges himself, his heirs, and successors, who should inherit his estate at Cayon, in the island of Saint Christopher's, to clear the lands above mentioned of all debts, and to warrant and defend his said assignation, to be good, valid, and sufficient to the Plaintiff Mary, during her natural life, and after her decease to the Plaintiff Susannah, and the heirs of her body for ever, and thereby directed the said deed to be registered in the Books of Session, and appointed a proctor for that purpose. That the said deed was in every particular duly executed and completed according to the law of Scotland, and the said Robert Cunyngham did on the 27th day of October, 1748, duly make and publish his last will and testament, written in his own hand; and thereby directed, that his lands and houses in Basseterre Town should be affixed to his plantation at Cayon, in the said island, and never to be separated therefrom, and he gave his said plantation and lands in Basseterre Town, and all the stock thereon, let to his son Daniel Cunyngham, the Defendant, at 2500*l.* a year, unto William M'Dowall, of Castle Semple, in the Shire of Renfrew, Esq., Drewry Ottley, of Saint Christopher's, Esq., and the Defendant Coleman, and their heirs, upon trust for the payment of his funeral expenses, *debts, and legacies*, therein particularly mentioned. And upon further trust for the said Defendant, Daniel Cunyngham, for life, with power for him to charge by his will the said premises with the double of such sums as he had or should receive as his wife's fortune, remainder after his said son Daniel's death

to his heirs male or female of his body, with divers limitations over upon conditions therein specified. And then amongst many legacies particularly set forth in the will, given to his children, grandchildren, and relations, the said testator gave to the Plaintiff Mary, by the description of his dear wife, Mary Gainer, which he had theretofore concealed, *all his lands, plate, household furniture, linen, and whatsoever he then had, or should have in Scotland*, at his death, for her life, for her maintenance; and for the maintenance and education of his daughter Susannah Cunyngham, and the heirs of her body; remainder to his said son Daniel Cunyngham, and his heirs for ever: and further bequeathed to his said wife 200*l.* a year for her life, to be paid quarterly, and all such money as Major James Dalrymple owed the said Testator, and thereby declared that the said provision was to be in full of her dower. And further directed, that all the produce of his plantation at Cayon, the necessary charges excepted, should be from time to time shipped on such ships as the Defendant William Coleman, his heirs and assigns, should direct; and consigned unto him and them, until the said Testator's funeral charges, *debts, and legacies* should be paid; and gave him and them power out of the said produce, as the same should be remitted to him and them, *to pay the said debts and legacies in Great Britain*, with interest, agreeable to his said will, without any order from his said executor, or any other person or persons who should then after come to inherit the said plantation; and the better to secure such consignments to the said Coleman, his heirs and assigns, until such debts and legacies were paid, the said Testator directed, that his said son, Daniel Cunyngham, and all others who should inherit the said plantation, should every year send an account to the said Testator's trustees, of the whole produce thereof, and how applied, and if his son, or others, should misapply the same, and not consign it to the said Coleman, his heirs and assigns, then it should be in their or one of their power, with the consent of one or more of the said Testator's Trustees, to put an overseer upon the said plantation, to manage the same, and

to send the produce thereof to the said Coleman, his heirs and assigns, and declared his said son, Daniel, executor of his said will. That the said Testator in his life-time owed several sums of money to divers persons, particularly to Elizabeth Kennedy, 1400*l.* carrying interest at five pounds per cent., which was secured as a mortgage upon his said lands at Craig, in Scotland, and to the said trustee, William M'Dowall, *l.* and to the said trustee, William Coleman, *l.* And the Plaintiff hoped she should have had quiet possession of the said lands and effects in Scotland conveyed to her by the said disposition, and that the said trustees would have cleared the same of all debts affecting the same out of the said Testator's estate at Saint Christopher's, and would have paid the annuity of 200*l.* during the Plaintiff's life, according to the directions in the said will. But Elizabeth Cunyngham, at the instigation of the Defendants, or some of them, immediately upon the death of the said Testator, entered into, and seized upon all the said lands and personal estate in Scotland, and put the Plaintiff to great expense in commencing and prosecuting several suits in that kingdom, which were determined in the Plaintiff's favour, and her right to the possession of the said lands and personal estate established; from which determination of the Lords of Council and Session, in order further to distress the Plaintiff, the said Elizabeth Cunyngham appealed to the Lords Spiritual and Temporal in Parliament. But the said Elizabeth Cunyngham, the day before the said appeal was to have come on, withdrew her petition of appeal, by which means the Plaintiff was put to a very great expense in preparing for her defence. That the said Daniel Cunyngham, as executor to the said will, had been cited into the Prerogative Court of Canterbury, to accept or refuse the probate of the said will; but in order to give the Plaintiffs all the vexation, and put them to all the expense he was able, had not to that time declared whether he would accept or renounce the same. And the Plaintiff Mary had frequently applied to the said trustees and executors, to pay to her the annuity of 200*l.*, as the same became due,

according to the direction of the said will, from the rents and profits of the said estates in Saint Christopher's, remitted to them; and from that fund to pay off and discharge the funeral expenses and incumbrances on the said Scotch estate; which they refused to do: and did spirit up and procure the said Kennedy, and several other creditors of the said Testator, to commence suits in Scotland against the Plaintiff, on purpose to load the said Scotch estate. And the said trustees M'Dowall and Coleman, had commenced suits in Scotland for very large debts, which they pretended to be due to them from the said Testator, in order to load the said Scotch estate, so given to the Plaintiffs; notwithstanding the whole plantation estate, amounting to 2500*l.* a year sterling, is paid into their hands; and although they were directed by the said will to disencumber the said Scotch estate,* by the produce of the Saint Christopher's estate. That the said trustees and executors had procured and spirited up one John Gibbs, who performed the Testator's funeral, to bring actions in Scotland, for the expenses of such funeral; and by keeping her from the possession of the Scotch estate and moveables; and by procuring and stirring up suits against that estate and moveables; and by neglecting to pay her any part of the said annuities, had brought her and her infant daughter, the Plaintiff Susannah, into the utmost distress; and when the Plaintiff was by the means aforesaid, destitute of all money and assistance, the said Daniel Cunyngham had the conscience to apply to the Plaintiff, by his agent, and proposed that if she would quit all her right and title for herself and child to the said lands and moveables in Scotland, which the Plaintiff charged were well worth 10,000*l.*, and to the annuity of 200*l.* he would in lieu thereof secure to her for her life 100*l.* a year, and 600*l.* in money; otherwise he would take care (be the expense ever so great to him) that Plaintiff should never

* This does not appear as a specific direction in the will. The words are general "to pay debts in Great Britain." See page 29.

receive the least benefit from the said deed of gift and will. The Bill then prayed, that the Defendants might be compelled to accept or refuse the said trust ; and to set forth an account of the trust estate, and the produce thereof which had come to their or either of their hands, and how they had applied the same : and that they might be compelled by the rents and produce, or if necessary, by mortgage or sale of the said plantation estate, to disencumber and clear the Scotch lands and moveables, and pay the Plaintiff Mary all the arrears of her 200*l.* a year, and the growing payments thereof, as they should become due ; and that in the mean time, if necessary, an overseer, or receiver, might be appointed on the said plantation estate ; and that the said disposition, conveyance, and deed of gift, made in favour of the Plaintiffs, might be confirmed ; and the said Testator's will established against the said Daniel Cunyngham, the heir-at-law, or that the Plaintiff Mary might have her dower.

The Defendants not having appeared at the hearing, a decree *nisi* was pronounced, and afterwards made absolute.

But upon the petition of the Defendants. Cunyngham, Otley, and Coleman, the cause was re-heard.

The Defendant Cunyngham, by his answer, set forth that Robert Cunyngham, his father, signed the deed, dated the 17th day of July, 1741 ; but he insisted that the same was not only void and insufficient in point of form, by reason of several defects in the execution thereof, but was also not completed in point of substance, so as to render the same binding and effectual, according to the laws of Scotland ; and the said Robert Cunyngham continued, as the Defendant believed, seized of the premises till his death. And insisted, that Plaintiffs ought not to avail themselves of the said deed, as an effectual conveyance of the said lands and premises to them, in the manner therein expressed, either against the Defendant or against the creditors of the said Robert Cunyngham, who have notwithstanding the same, a good right to resort to the said lands for the satisfaction of their demands. And in regard the said deed purported

to affect the said lands lying wholly in Scotland, and no part thereof in this kingdom; hoped the Court would leave the validity or insufficiency thereof, to be determined by the laws of Scotland, where the same was made, and where the said Robert Cunyngham, and the Plaintiffs, both resided at the time when the same was made. That the Plaintiff Mary, about the time when the said Deed of gift bears date, and for some time before, was by the Testator considered as the lawful wife of Captain Dalrymple, and was never acknowledged by the Testator in his life-time as his wife, save by the said pretended will; but that he always called her by the name of Dalrymple, by which name, both the children and all the servants in the family always called her. That Robert Cunyngham, the Testator, was long before the marriage pretended between him and the Plaintiff, married to another woman (as the Defendant believed) who was still living. That the Plaintiff Mary, on being summoned before the clergy and ministers of the Church of Scotland, declared that the Plaintiff Susannah was the child of, and begot by, the said Captain James Dalrymple, her husband. That the Testator, notwithstanding his marriage, some time before his death, lived and conversed with the Plaintiff Mary in a criminal way; but was looked upon and esteemed not to have been married to her. That his father, the Testator, was about the 7th day of January, 1742, being about nine months before his death, seized with a lethargick disorder, which totally deprived him of his senses for several days; and though he afterwards grew better, and was able to get about again, yet he never recovered the perfect use of his understanding, but continued from that time in a state of dotage and unsound mind to his death, and was not capable of making a will. That from his first seizure to his death, he was not of sound mind or understanding, so as to be capable of making a will; and that he was so totally under the power of the Plaintiff, that she could prevail on him to do any thing. That it appeared by the said will, that the legacies thereby left, amounted to the sum of $\text{\pounds}950\text{\textit{l.}}$, and the annuities thereby bequeathed, computing the same at

ten years' purchase, amount to the sum of 3000*l*. And the said Testator being indebted at his death in arrear, the sum of 10,000*l*., legacies, annuities, and debts, amounting together to near the sum of 20,000*l*. will, if the said pretended will be established, more than exhaust all the funds and estates, real or personal, which he left at his decease; so that the Defendant, the executor therein named, and the only surviving son of his said father, and who never dis-obliged him, and had then a wife and three children, to all of whom his said father in his life-time expressed the greatest affection, and who (on the face of the said will was intended to take a very beneficial interest under the same) would be entirely deprived of any provision from his said father, though the greatest part of the said estate in the West Indies came to him in right of his wife, the Defendant's late mother. And the said Defendant insisted, that, by the laws of Scotland, no lands or real estate whatsoever, are deviseable by will, but must be conveyed in the life-time of the party conveying by deed of gift. And therefore, in case the said pretended will had been duly executed by his said father, and he had the full enjoyment of his senses at the time of the execution thereof, yet the bequest therein to the Plaintiff, of all his lands and other things he had in Scotland at his decease, was a void devise; and he submitted that the Court should leave the Plaintiff to resort to such remedy in relation to the said estate in Scotland, as well under the said Deed of gift, as under the said will to which they should be entitled by the laws of Scotland, and which they should be able to obtain in that kingdom, without the interruption of this Court. That the Plaintiff's brought two several actions in the Courts of Scotland, one for the recovery of the goods, and the other for the recovery of the possession of the house and premises in Scotland. That the Lords of Session in the first of the said actions refused the Plaintiff access to the said moveable estate, till such time as the Defendant should return to Great Britain; and in the mean time ordered the same to be sold, and the money arising thereby, to be paid into the hands of the

Sheriff for such person as should appear to have the best right thereto; but in the other of the said actions pronounced sentence in favour of the Plaintiffs, from which last-mentioned sentence, the Defendant, Elizabeth Cunyng-
ham, in his absence, appealed to the Lords Spiritual and Temporal in Parliament. And the said Defendant saith, he having arrived in this kingdom from the West Indies before the said appeal came on, the said Defendant Elizabeth Cunyng-
ham had no further concern therein; and the Defendant having discovered that his father was greatly indebted at his death, and that several of his creditors had brought actions in Scotland, for the recovery of their demands out of the said estate; and that such demands would exhaust his estate and effects, the Defendant suffered the said appeal to drop. He admitted that he had been cited into the Prerogative Court, to accept or refuse the probate of the will; but being advised the same was not valid, on account of the incapacity of his father at the time when he made his will, he had declined to prove the same. That the Plaintiff Mary had applied to the Defendants M'Dowall and Coleman, to pay her said Annuity of 200*l.*, given to her by the said will, from the produce of the said estate in Saint Christopher's, and from that fund to pay off and discharge the funeral expenses and incumbrances on the Scotch estate, which they had refused to do on account of the invalidity of the said will. But he denied that he had spirited up or procured the said Elizabeth Kennedy to commence any suit against the Plaintiff, on purpose to load the said Scotch estate. He further answered, that he had ever since his father's death in his own right, and not as executor under the said will, been in possession of all his said father's plantation and effects in the West Indies; and that the consignments of the produce thereof, had since his death, from time to time been made to the Defendant Coleman, and that he had usually employed him as his factor, to dispose of such consignments for his use. And he insisted, that for the reasons in his answer assigned, the Plaintiffs were not entitled to have any account from him, or any other of the Defendants, of the Plantations of his said father: but in case

the Court should be of opinion that the Plaintiffs were entitled to such account, he submitted to be examined upon interrogatories touching the same. The said Defendant William Coleman the elder, by his answer stated, that the produce of the said estates in the West Indies, described in the will as let to the Defendant Daniel Cunyngham for the sum of 2500*l.*, was for several years before the Testator's death, consigned to the Defendant, to be disposed of here according to the general usage between planter and merchant. That for many years before, and to the time of the said Testator's death, there was a great intercourse of dealing between him and the Defendant on the account of the produce of his estate in the West Indies; and during that time, the Defendant disbursed several considerable sums of money for the said Testator. That by an account stated between the said Robert Cunyngham and the Defendant, on the 18th of August, 1731, and signed by them, there was owing from the said Robert Cunyngham to the Defendant, the sum of 4050*l.*; for securing which, together with such further sum as the Defendant should advance to or for the said Testator, a mortgage in fee of the plantation at Cayon was executed to the Defendant, and also a bond to the same effect. That the debt so due to the Defendant was increased by subsequent advances, and being very large, he had given directions to have the proper action brought in Scotland for the recovery of the same out of the said estate there: and he believed that such action had been accordingly brought, not to load the said Scotch estate, which he denied, but that all proper measures for securing so very large a debt might not be neglected; and the rather for that, by reason of the open and declared war with France and Spain, the Defendant's security on the said estates in Saint Christopher's, was become of less value than when originally made. That the produce of the said estates in Saint Christopher's had been consigned to the Defendant Cunyngham, in his own right as heir-at-law; and no part of the produce had come to his hands as trustee under the will. He desired to be at liberty to suspend his election, whether he would accept or refuse the trust till the will should be established; and insisted that

he was not compellable to set forth any account of the said plantation, or of the rents and profits thereof received by him, or how the same had been disposed of. But if the Court should be of opinion, that he ought to set forth such account, he submitted to be examined upon interrogatories in relation thereto.

Whereupon, and upon debate of the matter, and hearing the will of the said Testator, Robert Cunyngham, dated the 27th of October, 1743, the prayer of the Plaintiffs' bill; the answer of the said Defendant, William Coleman the elder; the answer of the said Defendant, Daniel Cunyngham; a letter from the said Defendant, William Coleman the elder, to the said Testator, Robert Cunyngham, dated the 5th of November, 1743; a letter from the said Testator, Robert Cunyngham, to the said Defendant, William Coleman the elder, and Company, dated the 20th of October, 1743; a letter from the said Defendant, Daniel Cunyngham, to Robert Wallis, dated the 7th of February, 1744; another letter from the said Defendant, Daniel Cunyngham, to the said Robert Wallis, dated the 6th of May, 1745, the decree dated the 13th of April, 1749, and the proofs taken in the cause, read.

His Lordship ordered, that the said decree be varied, and be as follows:—Declare that the said Testator Robert Cunyngham's will ought to be established, and the Trusts thereof performed; (and the court ordered and decreed the same accordingly;) and that it be referred to the said Master to take an account of what is due to the Plaintiff, Mary Cunyngham, for the arrears of the annuity of 200*l.* a year, given her by the said Testator's will; and the said Master is also to take an account of the said Testator's debts and incumbrances, affecting his moveables and real estate in Scotland, and of all other his debts, funeral expences, and legacies, and compute interest, on such of them as carry interest; and the said Plaintiff, Mary, is to stand in the place of such creditors, who have received, or shall hereafter receive, satisfaction for their debts, out of the said moveables, and real estate in Scotland, for such sums of money as the said creditors have received, or shall receive therefrom. And it is

further ordered, that the said Defendants, Daniel Cunyngham, and William Coleman the elder, do come to an account before the said Master, for the rents, profits, and produce of the said Testator's plantation in St. Christopher's, called Cayon Plantation; and of the lands, and houses, in Basseterre Town, affixed, or annexed thereto by the will, with the appurtenances received by the said Defendants, Cunyngham and Coleman, or either of them, or by any other person or persons, by their, or either of their order, or for their, or either of their use. In the taking of which account, all parties are to have all just allowances; and the said Master is to make an allowance of interest, accrued on the said mortgage made by the said Testator in his life-time, of the said Cayon Plantation, to the said Defendant Coleman, and out of what shall be coming on such account, of the rents, profits, and produce, of the said Testator's said plantation, called Cayon Plantation, and lands, and houses, in Basseterre Town, affixed, or annexed thereto as aforesaid, with the appurtenances, the several debts and incumbrances of the said testator, affecting his moveables and real estate in Scotland, are to be paid and satisfied. And it is further ordered, that the said Plaintiff, Mary Cunyngham, be paid thereout such of the said debts and incumbrances, as have been or shall be paid out of the said testator's said moveables and real estate in Scotland; and also such costs and damages as the said Plaintiff, Mary Cunyngham, has been put unto or sustained by reason of any action or suits brought by the said creditor's relating thereto, to be settled by the said Master, and also what shall be found due to her for the arrears of her said annuity of 200*l.* a year. And it is further ordered, that the said Defendants do pay and apply what shall be found due from them respectively on the said account accordingly; and also out of the rents and profits and produce of the said plantation, called Cayon Plantation, and the said lands and houses in Basseterre Town to be received, the said Plaintiff, Mary Cunyngham, is to be paid her said annuity of 200*l.* a year, as the same shall become due according to the directions of the said Testator's will; and after satisfaction of the said testator's debts, &c. it is ordered that the said Defendant Cole-

man do make his election before the said Master, whether he will continue to act in the trust under the will, and postpone the payment of his own incumbrance on the estate before-mentioned pursuant to the said testator's will: and if he shall elect so to do, it is further ordered, that the said Defendant, Daniel Cunyngham, do from time to time consign and send over the profits and produce of, &c. to the said Defendant Coleman, to be applied by him according to the said testator's will, and this decree. But if the said Defendant Coleman shall elect, not to continue to act in the said trust, and to postpone the satisfaction of his said incumbrances on the said estate, pursuant to the said will, it is further ordered, that in that case, it be referred to the said Master, to appoint a proper person in London, to whom the said Defendant, Daniel Cunyngham, shall consign and send over the profits and produce of the plantation, lands, and houses, before-mentioned, to be disposed of and applied, according to the directions of the said testator's will, and this decree. And the said Defendant Cunyngham, is accordingly, from time to time, to consign and send over the said profits and produce to such person so to be appointed.*

The principal question between the material parties to the suit in the Court of Chancery appears again, in 1758, to have become the subject of litigation in the Court of Session in Scotland. An abstract of the facts, and the judgment in the case, is given by Lord Kaims, in his *Decisions*, vol. iii. p. 25, in the following terms:—

* This decree contains no direction, that D. Cunyngham should elect, either to take the Cayon estate under the will, subject to the charges, and leave the Scotch estate discharged of debts, to the Plaintiffs; or otherwise, that the Plaintiffs should be compensated out of the larger estate, for the value of the Scotch property if taken by D. Cunyngham. It seems that the Court of Chancery in England, and the Court of Session in Scotland, considered the acts done by the Defendant Cunyngham, or the matter of his answer, as amounting to an election.

CUNNINGHAMS
v. GAINER,
Jan. 17, 1758,
Kaim's Decis.
vol. 3, p. 25.

A person possessed of one estate in the island of St. Christopher's, and another in Scotland, executed a testament upon his death-bed in Scotland; by which he bequeathed to his son the estate in St. Christopher's, with the burthen of his debts; and by another clause, he bequeathed the estate in Scotland to his wife, and her heirs. A creditor of the defunct's having adjudged the estate in Scotland, the relict brought a suit in Chancery, against the son, and other trustees, for having the Scotch estate relieved of the debts out of the produce of that in St. Christopher's. The will was established by the Chancellor's decree, and the Scotch estate ordained to be relieved of the debts. The relict having claimed the lands conform to the testament, it was pleaded for the son, in a multiplepinding, brought by the tenants, that the legacy was void, as the lands could not, by our law, be conveyed by a testamentary deed. Answered for the relict, that as the testament had been found valid by the law of England to convey the estate in St. Christopher's in favour of the son, who was residuary legatee of that estate, and had a lucrative succession, he was thereby barred from challenging the settlement made in the same deed of the Scotch estate. The Lords found, that the son could not quarrel the conveyance by legacy of the Scotch estate; and preferred the relict.*

1819.
KER v. WAU-
CHOPE.

On the 5th of May, 1819, the judgments of the Court below were varied by a declaration that the Appellants could have no claim to a life-interest

* The question of election has occurred most frequently upon the wills of persons who had been domiciled in privileged places, where the old customary laws of distribution prevail, as London, York, &c. Upon the general doctrine of Election and Compensation, in addition to the cases cited in the argument, see *Noys v. Mordaunt*, 2 Vern. Rep. 581, and the cases collected in Mr. Raithby's Note. See also *Cary v. Askew*, 2 Cox's C. C. 241; *Forrester v. Cotton*, 2 Eden's C. C. 532; *Unett v. Wilkes*, Id. 187; *Arnold v. Kempsford*, Id. 256; *E. of Northumberland v. M. of Granby*, Id. 489; and *Green v. Green*, 2 Meriv. 86.

in the personalty, either as next of kin or in any other way: subject to that variation they were affirmed. And the cause was remitted for judgment upon the question whether, as by the terms of the Duke's settlement the residue is declared not to be payable till after the death of his sisters, the residuary legatees are intitled to demand payment thereof immediately.*

1819.

KER & WAUGH-
CHOPE.

* In the law which regulates *Election* and *Compensation*, and the doctrine of *Approbate* and *Reprobate*, the distinction between the cases where the bequests, gifts, or limitations are contained in one instrument, and where they are several, has been the subject of strong observation in the arguments of the principal case. Upon this question it is to be remarked that a similar principle is acknowledged, in applying what is called the Rule in *Shelley's Case*. If there be in a will or deed a limitation to A. for life, directly or resulting by implication, and in the same instrument a limitation to the heirs of A. the two limitations, by the operation of the rule above-mentioned, give an immediate executed estate of inheritance to the ancestor; but it is otherwise where the two limitations are in different instruments, although the one refer to the other, as where lands were given by deed to A. for life, and by a will a remainder in the same lands was given to the heirs of the body of A., although the estate for life given by the deed was recited in the will, it was held that they did not unite so as to give an estate tail to A. but that the heirs of his body took by purchase. *Fonnereau v. Fonnereau*, Doug. Rep. 470. Yet there is one case, *Hayes v. Foorde*, 2 Black: Rep. 698, in which the two limitations being on separate and distinct papers, viz. a will referring to a schedule which was annexed, both instruments having been published at the same time, with the same solemnities and attestation, and the jury by their special verdict (upon which the case was argued) having found as a fact that the schedule was part of the will, the Court considered them as several parts of the same instrument, and held the rule in *Shelley's Case* to be applicable. The grounds upon which these similar rules in different branches of law have been adopted, would be found, upon investigation, to differ perhaps materially. But the limits of a note do not admit of such an inquiry.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

PATON *Appellant.*BREBNER and another *Respondents.*

1819.

PURCHASE OF
FEU BY LESSEE
—MERGER OF
LEASE.

A lessee becoming purchaser takes upon himself the covenants or warranties of the lessor.

A. and B. having a lease for years of lands “with the privilege of taking water from an adjoining river, for the purpose of driving machinery, &c.” which lease and privilege were warranted to the lessees, they enter into a contract with the lessor, in which it is expressed, “that the lessor agrees to grant a feu-charter of the lands under lease, with all the right members, privileges, and appurtenances thereunto belonging, or which ever have been competent to the heritor of the said lands to claim and enjoy. It being the intention of the parties thereto, that all rights and privileges of or belonging to the said lands formerly leased, should be feudally conveyed by the lessor to the lessees, &c. It was insisted by the lessees, that under this contract they were intitled to have a feu-charter executed according to the words of the lease. But the House of Lords reversing the judgment of the Court of Sessions, decided, that the feu-charter must follow the words of the contract; and Eldon, Chancellor, in moving the judgment, intimated his opinion that the privilege of taking water from the river, *was not included in the words, or legal import of the contract.*

THE Appellant in this case was proprietor of an estate called Grandhome, on the northern bank of the river Don, near the city of Aberdeen. The Respondents were at first lessees, and afterwards pending the leases, purchasers under feu-contracts of lands forming part of the estate of Grandhome, with certain rights and privileges

which in the feu-contracts were expressed in words differing from those inserted in the leases.

1819.

The question between the parties to the appeal was, whether the feu-contracts (or agreements for sale and purchase) were to be carried into execution by inserting in the feu-charter (or deed of conveyance) the words respecting privileges, as expressed in the leases, or those which appeared in the feu-contracts.

PATON v.
BREBNER AND
ANOTHER.

On the 20th of February,* 1792, articles of lease, between John Paton, (the Appellant) on the one part, and Messrs. Brebner, and Hadden, (the Respondents) and Thomas Leys, (a partner of the Respondents, since deceased,) on the other part, were drawn up and signed by the parties.

By the first article, “ the said John Paton sets
“ and lets in tack to the saids Alexander Brebner,
“ James Hadden, and Thomas Leys, and to their
“ heirs and assignees, for the space of 99 years,
“ from and after the term of Whitsunday in the
“ year 1793, for payment of the yearly rent, and
“ upon the other conditions underwritten, all and
“ whole the haugh of Mains of Grandhome,
“ consisting of, &c.”

By the second article it is agreed, “ that the
“ said tacksmen and their foresaids shall have *the*
“ *privilege and liberty of taking in water from the*
“ *river Don for the purpose of driving machinery*
“ *and other uses, and of cutting canals through*

* The instruments out of which the question arises, are long and numerous. The material parts of them, forming the basis of the judgment given in the House of Lords, are extracted and inserted in the text.

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“ the said grounds, as they shall judge necessary ;
 “ with the privilege of all roads to the bridge of
 “ Don and Aberdeen, and such right to a pas-
 “ sage-boat across the said river Don, opposite to
 “ their grounds, as the said John Paton may have to
 “ give ; together with the privilege of quarrying
 “ stones, to be used for any purposes which the
 “ said tacksmen shall think proper upon the
 “ grounds hereby set, on such parts of the hill of
 “ Grandhome as shall not happen to be planted or
 “ improved, also in any other quarries on said
 “ estate already opened or to be opened by the
 “ heritor, or by others having his authority : and
 “ that the said John Paton, either as proprietor
 “ of the lands hereby set, or as an heritor of the
 “ cruives, shall allow, as far as he can, the said
 “ tacksmen to discharge their water on any part
 “ of the said haugh they may see proper ; and
 “ whatever trees the said tacksmen shall plant,
 “ that they shall have liberty to cut or dispose of
 “ the same during the lease.”

By the third article, it is agreed between the parties, “ that the said tacksmen shall have li-
 “ berty at any time betwixt the date hereof and the
 “ said term of Whitsunday 1793 years, to cut a canal
 “ through the said grounds for the purpose of in-
 “ troducing water, upon allowing to the present
 “ tenant the amount of whatever damage he shall
 “ be found to have sustained thereby, as the same
 “ shall be ascertained by two arbiters, to be mu-
 “ tually chosen, with liberty to them, if they
 “ should happen to differ, to choose an oversman
 “ for finally determining the same ; and farther, if

“ the said tacksmen shall think proper, in the
 “ mean time, to erect any houses upon any part of
 “ the grounds above described hereby set, that
 “ they shall have liberty to do so, upon their in-
 “ demnifying the present tenant of the damage
 “ which he may also thereby sustain, as the same
 “ shall be ascertained in like manner by proper
 “ judges, to be mutually chosen by the par-
 “ ties.”

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By the fourth article, “ the saids Alexander
 “ Brebner, James Hadden, and Thomas Leys,
 “ agreed, &c. to pay to the said John Paton, &c.
 “ for the lands set to them as above, at the rate
 “ of 3*l.* sterling for each acre thereof, but with a
 “ deduction therefrom yearly of 7*l.* 17*s.* 6*d.* sterl-
 “ ing, on account of the barren ground compre-
 “ hended therein; and also with a deduction from
 “ said rent of 1*l.* 11*s.* 6*d.* sterling yearly, for each
 “ acre of the foresaid pieces of ground called the
 “ Devil’s Hillock and the Lowing-ill Hillock, the
 “ said sum of 3*l.* per acre, to be in full for rent,
 “ multure, and every thing else exigible by the
 “ heritor, and to be payable at Martinmas and
 “ Whitsunday, after shearing each crop, by
 “ equal portions, with interest thereafter till
 “ paid, and a fifth part more of liquidate pe-
 “ nalty in case of faillic; and also, they became
 “ bound to build, upon their own expence, a
 “ sufficient march-dike of stones, as far as the
 “ head or west end of Downie’s Hillock, and to
 “ uphold the same during this lease.”

By the fifth article, it is agreed, “ that the said
 “ tacksmen shall be obliged to erect and make out

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“ a bleachfield or manufactory upon the said haugh;
“ but, on account of the expensive buildings
“ which they must thereby erect, the heritor to
“ be obliged to pay or allow for such buildings as
“ may be standing on the grounds so set at the
“ issue of this lease, the value thereof to the ex-
“ tent of 500*l.* sterling, including mason, smith,
“ slater, glazier, and wright work, according as
“ the same shall be ascertained by skilful persons
“ to be mutually chosen by the heritor and tacks-
“ men; but that the said tacksmen shall have
“ right to remove whatever machinery they may
“ see proper.”

By the sixth article, it is agreed, “ that the
“ said tacksmen shall be obliged to carry all the
“ grindable grain which may grow on the lands
“ so set to them, and which they may have oc-
“ casion to grind, to the mill of Grandhome, and
“ to pay the miller for his trouble in grinding the
“ same the one-and-fortieth peck; and if the mill
“ is frequented by the said tenants, they are to
“ join in supporting the same and the dam-dike, as
“ the other tenants, in proportion to their ground.

By the seventh article, it is agreed, “ that
“ the tenants of Mains of Grandhome and Dens-
“ town, and the heritor for his own use, shall
“ have the use of the road through the haugh of
“ Rappahanna for all purposes whatsoever; but
“ that the other tenants shall only have right to
“ use it as a foot-road; but if the present road
“ shall interfere with their operations, the said
“ tacksmen shall have full liberty to turn the said
“ road to the lower part of the haugh.”

By the eighth article, it is provided that, “ if, in
 “ using any of the aforesaid quarries, the said
 “ tacksmen shall happen to go into inclosures or
 “ improved grounds, that they shall be obliged to
 “ make good to those concerned any damage which
 “ may be occasioned thereby.”

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By the ninth article, “ the said John Paton
 “ reserves to himself and his foresaids a right
 “ to allow stones to be carried to the cruives
 “ along the haugh of Rappahanna as formerly ;
 “ and if the heritors of the cruives shall have oc-
 “ casion to build more houses for the accommo-
 “ dation of their fishings, the said John Paton
 “ thereby reserves for that purpose, from the lands
 “ thereby set, a space of ground equal to what
 “ they at present occupy, adjoining thereto, and
 “ that without any diminution from the rent
 “ above-mentioned; and the heritors of the cruives
 “ are to have liberty of laying down stones as
 “ formerly along the river, on their making an
 “ acknowledgment therefore to the said tacksmen,
 “ as they now do to the present tenant.”

Under a provision contained in the preceding
 articles, and in pursuance of the contract, a
 lease was executed, bearing date the 31st of
 March, 1797, by which “ it is contracted, finally
 “ ended, and mutually covenanted and agreed
 “ upon, between John Paton, Esq. of Grandhome,
 “ heritable proprietor of the lands after-mentioned,
 “ on the one part, and Alexander Brebner, James
 “ Hadden, and Thomas Leys, all merchants in
 “ Aberdeen, on the other part, in manner and to
 “ the effect following: That is to say, Whereas

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“ by articles and conditions of lease entered into
“ and executed between the said parties, of date
“ the 20th day of February, 1792, the said John
“ Paton, &c. And whereas, in consequence, and
“ upon the faith of the foresaid articles and con-
“ ditions of lease, the saids Alexander Brebner,
“ James Hadden, and Thomas Leys, have, at a
“ very great expence, cut a canal through the
“ grounds set to them, as above, and that they
“ have thereby introduced water from the river
“ Don, for the purposes of the manufactory and
“ machinery already erected, or that may here-
“ after be erected, upon the premises, and that
“ they have also erected various buildings, and
“ made sundry other considerable improvements
“ upon the foresaid lands : And whereas both the
“ said parties are now desirous, in further imple-
“ ment of the foresaid articles and conditions of
“ lease, to enter into the tack under-written by
“ way of amplification and extension of the fore-
“ said articles and conditions of lease, and for
“ ascertaining the precise rent or tack-duty to
“ be payable by the tacksmen above-named, and
“ their foresaids, to the said John Paton and his
“ above-written ; but always without hurt or pre-
“ judice of the before-mentioned articles and
“ conditions of lease, and only in further corro-
“ boration thereof by the said parties respectively:
“ Therefore the said John Paton, for him, his
“ heirs and successors whomsoever, on the one
“ part, hereby not only ratifies, homologates, and
“ approves of the articles and conditions of lease
“ above deduced, in the haill heads, articles,

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“ clauses, and conditions thereof, prestable or
 “ binding upon him as proprietor of the said
 “ land, with all that has followed thereon, except-
 “ ing only in as far as is now precisely fixed and
 “ determinately ascertained by these presents;
 “ but also, by these presents, in further imple-
 “ ment and extension of the same, on his part,
 “ of new sets, and in tack and assedation lets to
 “ the saids Alexander Brebner, James Hadden,
 “ and Thomas Leys, and to their heirs and assign-
 “ nees, for the space of ninety-six years, &c. all
 “ and whole the foresaid haugh of Mains of
 “ Grandhome, consisting of, &c. together with
 “ the whole *liberties and privileges* in favour of
 “ the said tacksmen, *particularly specified in the*
 “ *articles and conditions of lease* above-mention-
 “ ed, to which reference is hereby had for that
 “ purpose, and which shall remain as effectual and
 “ binding upon the said John Paton and his fore-
 “ saids as if the same had been again herein par-
 “ ticularly enumerated and expressed, &c. But
 “ excepting always from this lease that piece of
 “ ground feued off by the said John Paton to the
 “ heritors or proprietors of the cruive fishings
 “ upon the Don, as the same has been lately in-
 “ closed. Which tack, with and under the reser-
 “ vations and declarations above written, the said
 “ John Paton binds and obliges himself, his heirs
 “ and successors, to warrant to the saids Alexan-
 “ der Brebner, James Hadden, and Thomas Leys,
 “ and their foresaids, at all hands, and against all
 “ deadly, as law will. And, on the other part,
 “ the saids Alexander Brebner, James Hadden,

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“ and Thomas Leys, not only hereby ratify, ho-
 “ mologate, and approve of the articles and con-
 “ ditions of lease above-mentioned, in the hail
 “ heads, articles, clauses, and conditions thereof
 “ binding and prestable upon them, with all that
 “ has followed thereon, excepting only in as far as
 “ are now precisely fixed and determinately ascer-
 “ tained by these presents; but also, in consider-
 “ ation of said lease, and privileges thereby grant-
 “ ed to them, bind and oblige themselves, &c. to
 “ make payment to the said John Paton, &c. of
 “ the sum of 202*l.* 8*s.* 3*d.* sterling, and that in full
 “ of rent, multures, or services, for the subjects
 “ and privileges so let to them, &c. yearly, in the
 “ name of tack-duty.”

By an agreement entered into between the Appellant and Respondents, dated 3d and 9th February, 1810, reciting the effect of the leases theretofore made, and still subsisting, it is agreed,
 “ That the said John Paton shall forthwith es-
 “ tablish, and make out a good and satisfactory
 “ title in his own person, as heritable proprietor
 “ of the lands therein-before specified; and,
 “ moreover, upon the request of the said Alex-
 “ ander Brebner and James Hadden, (Thomas
 “ Leys being dead), in consideration of the pur-
 “ chase-money, and subject to the annual feu-
 “ duty therein after to be mentioned, by sufficient
 “ and proper conveyances in the law, but at the
 “ cost and charge of the said Alexander Brebner
 “ and James Hadden, he, the said John Paton,
 “ shall and will grant one or more feu-charters
 “ to and in favour of the said Alexander Brebner

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“ and James Hadden, their heirs, executors, and
 “ assigns, or as they shall direct, over and upon
 “ all the lands therein before-mentioned and re-
 “ ferred to, comprising Old Grandhome, Grand-
 “ home Haugh, Downie’s Hillock, Chapel Park
 “ of Mains of Grandhome, and others, by what-
 “ soever names or descriptions known, which are
 “ comprised in the leases theretofore granted to
 “ the said Thomas Leys, Alexander Brebner, and
 “ James Hadden, jointly, and in the lease granted
 “ to the said James Hadden individually, with
 “ the small addition since made thereto, and for
 “ which lands they now pay a rent of 34*l.* 5*s.* 10½*d.*
 “ in the whole, *with all the rights, members, pri-*
 “ *viliges, and appurtenances thereunto belonging,*
 “ *or which ever have been competent to the heritor*
 “ *of the said lands to claim and enjoy*; it being the
 “ intention of the parties thereto, that *all rights*
 “ *and privileges of*, or belonging to, the said lands
 “ *formerly leased* to the said Thomas Leys, Alex-
 “ ander Brebner, and James Hadden, jointly, and
 “ to the said James Hadden individually, for a
 “ limited period, (including also the aforesaid
 “ three additional acres) shall now be feudally
 “ and for ever conveyed by the said John Paton
 “ to the said Alexander Brebner and James Had-
 “ den, their heirs, executors, and assigns, or as
 “ they shall direct; in consideration whereof,
 “ the said Alexander Brebner and James Hadden
 “ hereby agree to pay to the said John Paton,
 “ his heirs, executors, or assigns, the sum of
 “ 5000*l.* sterling money, at the term of Whitsun-
 “ day next ensuing the date thereof; and more-

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“ over, to pay to the said John Paton, his heirs, ex-
 “ ecutors, or assigns, the sum of 345*l.* 5*s.* 10½*d.*
 “ yearly, as a feu-duty for ever of and upon the
 “ several premises herein before described. And
 “ it is hereby further agreed, by and between the
 “ said parties, that if, on or before the 1st day
 “ of April, 1810, the said Alexander Brebner and
 “ James Hadden, or their heirs, executors, or as-
 “ signs shall be inclined to purchase up and re-
 “ deem the said annual feu-duty, it shall be com-
 “ petent to them, and they shall have an option
 “ so to do, upon paying a consideration therefore,
 “ equal to 25 years amount of the said annual
 “ feu-duty.”

By a tack, dated the 26th of October, 1797,
 “ it is contracted, ended, and agreed betwixt
 “ John Paton of Grandhome, heritable proprietor
 “ of the lands, and others under-written, on the
 “ one part, and Alexander Brebner, Thomas Leys,
 “ and James Hadden, merchants in Aberdeen, on
 “ the other part, in manner following, that is to
 “ say, whereas the said Alexander Brebner,
 “ Thomas Leys, and James Hadden, have fixed
 “ on the grounds hereinafter described, as afford-
 “ ing an eligible situation for the erection of ma-
 “ chinery fitted for manufacturing purposes, and
 “ have in that view *agreed with* the said John
 “ Paton for the lease under-written, and *for the*
 “ *liberty and privilege of taking water from the*
 “ *river Don by a canal or cut for serving such*
 “ *machinery*, and for other purposes connected
 “ with any manufactory or manufactories to be

“ erected by them on the grounds after-mentioned.
 “ Therefore, and for completing the said agree-
 “ ment, the said John Paton hath set, and by these
 “ presents for him, his heirs and successors whom-
 “ soever, but with and under the conditions, de-
 “ clarations, limitations, and reservations under-
 “ written, and for payment of the rents and others
 “ after specified, sets and in tack and assedation
 “ lets to the saids Alexander Brebner, Thomas
 “ Leys, and James Hadden, equally among them,
 “ and to their heirs, assignees, or subtenants, for
 “ the space of one hundred and twenty-nine years,
 “ from, &c. all and whole the crofts of land called
 “ the Crofts of Craighaar of Grandhome, &c. toge-
 “ ther with that patch of planted ground lying
 “ betwixt the said crofts and the river Don; and
 “ also, &c. Moreover, the said John Paton hath
 “ given and granted, and by these presents for him
 “ and his foresaids, gives, grants, and lets to the
 “ saids Alexander Brebner, Thomas Leys, and
 “ James Hadden, equally among them and their
 “ above-written, for the space and term of one
 “ hundred and twenty-nine years above-mention-
 “ ed, from and after the said term of the com-
 “ mencement hereof, the *full right, privilege, and*
 “ *liberty of taking off water from the river Don,*
 “ and of digging, making, embanking, and main-
 “ taining a canal, cut, or water-draught, commu-
 “ nicating with and conveying water from the said
 “ river at or near, &c. together also with the sole
 “ and exclusive use, benefit, right, and privilege to
 “ the tacksmen above-named and their foresaids,
 “ of the said canal or water-draught, and of all and

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“ every fall or falls of water which they shall think
“ proper to make and be able to establish along
“ the course of the same, within the limits of the
“ lands set to them as above for the purpose of
“ any manufactory or manufactories they may
“ think proper to erect and carry on upon the pre-
“ mises at any time or times during the term of
“ years above-written ; and with full power, &c.
“ as also, in regard it will be necessary for the
“ tacksmen above-named to build, at a considerable
“ expence, various houses for the purpose of their
“ intended manufactories, on the grounds above
“ set to them, of which expence it is reasonable
“ that they should be indemnified at the issue of
“ this lease to a certain extent, the said John
“ Paton therefore binds and obliges himself and
“ his above-written at that period, to pay to the
“ said tacksmen and their foresaids the value of
“ such houses as they may then have or leave
“ standing thereon, according to the appreciation
“ of persons of skill, to be mutually named by the
“ parties at the time, in which valuation is to be
“ included stones, brick, timber, slate, tyle, iron,
“ glass, plaister, and lead work ; but the proprietor
“ shall not be obliged to pay for such buildings or
“ materials to a higher amount than 1500*l.* ster-
“ ling ; and the tacksmen shall be at liberty to
“ remove their machinery and implements of ma-
“ nufacture of all kinds, wherewith it is hereby
“ declared the proprietor is to have no concern,
“ the same being understood to be the absolute
“ property of the tacksmen, &c. for which causes,
“ and on the other part, Alexander Brebner, &c.

“ bind themselves, &c. to make payment and satis-
 “ faction to the said John Paton, &c. of the yearly
 “ rents, duties, and consideration money under-
 “ written, that is to say, of the sum of 13*l.* sterling
 “ in full of rent, multures, and services, for the
 “ crofts of Craighaar and whole, &c.—Item, of
 “ the sum of 100*l.* money foresaid in the name of
 “ *rent or consideration money for the grant or*
 “ *privilege of taking water from the river Don,*
 “ and of making, using, and maintaining the fore-
 “ said intended canal or water-draught, with the
 “ benefit and use of the fall or falls of water to be
 “ obtained thereby for the purposes before ex-
 “ pressed, and other privileges before enumerated
 “ connected therewith, &c.

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By an instrument, dated the 19th and 23d of
 May, 1810,* “ it is contracted between John
 “ Paton, &c. and A. Brebner, &c. that John Paton,
 “ in consideration of the feu-duties, sums of
 “ money, and other prestations after specified, hath
 “ sold, and in feu-farm and heritage disposed to
 “ the said Alexander Brebner and James Hadden,
 “ equally between them, and their heirs and as-
 “ signees whomsoever, all and whole those parts
 “ of the lands and estate of Grandhome called
 “ Persleys, with the whole other possessions, water-
 “ falls, quarries, *privileges, and pertinents of the*
 “ *same, as at present enjoyed by and under lease or*

* In extracting the above instruments, it should have been
 noticed that the leases have respectively clauses of absolute
 warrandice.

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“ *leases to the partner or partners of the company*
 “ *trade carried on at Aberdeen and Persley, under*
 “ *the firm of Milne, Cruden, and Company, &c.*
 “ *Moreover, the said John Paton sells and dis-*
 “ *poses to the said Alexander Brebner and James*
 “ *Hadden, and their foresaids, (subject to the feu-*
 “ *duty after-mentioned) all and whole these crofts*
 “ *of land called the Crofts of Graighaar of Grand-*
 “ *home, with the whole other grounds, waterfalls,*
 “ *privileges, and pertinents specified and described*
 “ *in a lease thereof, bearing date the 26th day of*
 “ *October, 1797, &c. But reserving always to the*
 “ *said John Paton, his heirs and successors, the*
 “ *right of fishing in the river Don, opposite to*
 “ *and along the whole of the lands above men-*
 “ *tioned, &c.*”

After the signing of the agreements, the Respondents paid 5,500*l.* to the Appellant, on account of the purchase money, for which the agent of the Appellant gave a receipt in the following terms: “ For a feu-right to be granted in their
 “ favor by Mr. Paton, on the lands of, &c. in the
 “ terms of two agreements, entered into between
 “ them dated, &c.” The Respondents, from the respective dates of the leases until the signing of the contracts of sale, had been in possession of the premises as lessees. They had erected machinery at a great cost, and had exercised the right of drawing water from the river, with the other rights granted under the leases. Shortly after the signature of the contracts, the Respondents called upon the Appellant to fulfil the contracts by executing a feu-charter. Thereupon

differences arose between the parties, as to the terms in which those contracts ought to be carried into execution. The Appellant proposed to grant a charter in the terms of the agreement which he had signed. The Respondents insisted that the charter should comprehend the clauses contained in the leases to them, and to Milne, Cruden, respectively, and Co. with absolute warrandice of all the rights granted by the leases to use the water of the Don, as rights and privileges warranted to belong to the lands. The clauses by the Respondents proposed to be inserted were as follows:—

“ That John Paton, &c. in consideration, &c. in
 “ feu-farm disposes, &c. to A. Brebner, &c. all the
 “ lands of Grandhome, (the lands in the first
 “ agreement) &c. *together with the privilege and*
 “ *liberty of taking in water from the river Don,*
 “ for the purpose of driving machinery and other
 “ uses, and of cutting canals, &c. As also that
 “ piece of ground, &c. (under lease to Milne,
 “ Cruden, and Co. being the lands in the second
 “ agreement) together with the privilege, &c. of
 “ taking off water from the river Don, and digging
 “ &c. a canal, &c. and conveying water from the
 “ said river, &c. for serving machinery,” &c.

After a long negotiation carried on to adjust these differences, a feu-charter was drawn up by the Appellant's agent, containing the clauses contended for by the Respondents. The only matter in difference then remaining to be settled, as the Respondents represented, was, whether a clause of irritancy *ob non solutum canonem*, should be inserted in the charter, the Appellant claiming

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and the Respondents resisting the introduction of such a clause. The differences being brought to this point, the matter was referred, upon a case drawn up and signed by the parties, to Mr. Cathcart, now one of the Lords of Session, who gave his award against the Appellant.*

The Appellant having finally refused to execute a feu-charter, containing the clauses proposed by the Respondents, an action for implement of the agreements was commenced in the Court of Session. The summons (after setting forth the agreements, the draft of a feu-charter, the negotiations, the single point to which the differences were reduced, the case reciting that fact, signed by the Appellant, and the award) concludes by praying, that “the said John Paton should be “decerned and ordained, by decree of the Lords

* By the pleadings in the court below, and in the printed case presented to the House of Lords, it was alleged by the Respondent, that the Appellant had finally settled and approved the feu-charter, with the exception stated in the text, and had given up his objection to execute the charter with a clause, giving the right to take water from the Don. This allegation was contradicted by the Appellant, who averred that he had annexed to the case submitted to Mr. Cathcart, a writing, or letter, in which he desired that the question as to the privilege of taking water from the Don, might be considered and *decided by the arbitrator*. But this collateral question as to the case submitted to arbitration, and the effect of the award, does not seem to have been much discussed in the court below, nor to have been considered as a material ingredient in the formation of the judgment of the Lord Ordinary, or the Court of Session. It was necessary to state in the text the facts as they appear upon the pleading in the court below, because the Lord Chancellor, in moving the judgment in the House of Lords, adverts to this branch of the matters in dispute between the parties.

“ of Council and Session,, to execute and deliver a
 “ feu-charter in favour of the pursuers, in terms
 “ of the foresaid draft thereof, and relative de-
 “ scription of marches, both herewith produced
 “ and referred to, *salvo justo calculo*, as to the
 “ feu duties specified in the clause of *reddendo*
 “ thereof. That he should produce a legal and
 “ sufficient feudal title in his person, to the said
 “ lands *and others* foresaid, for establishing his
 “ right to grant the said feu-charter in favour of
 “ the pursuers, and that he should be decerned
 “ to purge all real incumbrances affecting the said
 “ lands *and others*, and to convey the same unin-
 “ cumbered to the pursuers.”

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The defences to the action consisted of three points :

1st, It is admitted by the defender that he entered into the obligations contained in the two agreements ; but that these agreements contain no obligation whatever upon the defender to admit or introduce into the feu-charter the clauses contained in the draft of the feu-charter produced, whereby it is proposed to bind the defender specially to grant to the pursuers power and liberty to take water from the river Don, for the purpose of serving the machineries and manufactories already established and to be established by them, and also to grant absolute warrandice of these privileges and liberties of taking the water, because he might expose himself to future actions of damages at their instance, to a far greater extent than the whole price he was to receive for the feus in question. That

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the pursuers having made a cut of great extent, for the purpose of taking a great quantity of water from the river Don, to serve their machinery and manufactures, they have been opposed and judicially interdicted from proceeding farther, by the proprietors of the salmon-fishings in the river Don, and the question is still in dependence.

2dly, The special conclusion of the summons being, that the defender "should be decerned to grant feu-charters, not in terms of the feu-agreements previously entered into, but in terms of a scroll or draft of a feu-charter produced and founded on by the pursuers," this conclusion of the action is utterly untenable. His intention in the feu-agreements having been to put the pursuers precisely in his own place, as proprietor of the lands to be feued, with all the privileges belonging to such right of property; but more than this he never agreed, nor can be bound in law to grant.

3dly, The defender never, at any time, agreed to dispoise or convey to the pursuers, the liberty and privilege of taking water at pleasure from the Don, which, as an individual heritor on the banks of that river, he had perhaps no right to grant, and which it would be most imprudent and dangerous in him to warrant to the pursuers. The defender never attested, or meant to attest, that part of the case laid before Mr. Cathcart, which stated that all parties were agreed upon the whole clauses contained in the proposed scroll, or draft, of a feu-charter, except the clause of conventional irritancy *ob non solutum canonem*; on the contrary,

at the very time when the defender returned to Dr. Daunev the case to be laid before Mr. Cathcart, he accompanied it by a holograph writing in these terms: "As Mr. Cathcart will have the agreement and copy of the feu-charter all before him, he will see exactly my situation, might I not have his opinion by itself on that head, as to my being obliged to warrant all these powers of taking in water from the river. It was what I had no idea of at the time I entered into these agreements; as, by selling the property, I thought I placed the purchaser exactly in the place I was in before."

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The action was brought to hearing before Lord Alloway, as Ordinary, on the 9th of February, 1814, when his Lordship pronounced the following interlocutor: "The Lord Ordinary, having heard parties' procurators on the libel, and grounds of defence, appoints the defender, within fourteen days, to prepare and lodge in the process the draught of a feu-charter, containing all the clauses and obligations which he considers himself bound and is willing to grant to the pursuers, in reference to the whole subjects in question."

After this, Mr. Paton put into process two separate draughts of feu-charters, or contracts, the one applicable to the subjects contained in the first feu-agreement, and the other relative to the subjects in the second agreement. The Respondents were allowed to be heard in objection to these proposed deeds, and the Lord Ordinary afterwards pronounced the following interlocutor: "The Lord Ordinary, having considered the original

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“ agreements betwixt the parties, and the draft of
 “ the feu-contracts produced in implement of
 “ these agreements, the minute given in by the
 “ pursuers, as containing objections to the feu-
 “ contracts produced by the defender, and an-
 “ swers thereto, together with the whole process,
 “ —finds, that two specific agreements, &c.
 “ finds, that the first feu-contract should proceed
 “ *narrativé*, by reciting *verbatim* the whole of
 “ the agreement entered into betwixt the
 “ pursuers and defender upon the 3d and 9th
 “ February, 1810, and state, that in implement
 “ of that agreement, the present feu-contract has
 “ been entered into betwixt the parties: finds,
 “ that the feu-contract should then contain an
 “ exact description of the subjects contained in
 “ the leases specially referred to in the agree-
 “ ment; and if the parties are agreed that a more
 “ minute and particular description of any part of
 “ the subjects should be inserted, it may, with
 “ their mutual consent, be inserted in this part of
 “ the deed; but if they do not agree, then the
 “ very words used in the description of the sub-
 “ jects in the leases should be adopted, *and the*
 “ *feu-contract shall dispone and confer all the*
 “ *rights and privileges contained in the leases as to*
 “ *those subjects contained in the leases*; and with
 “ regard to the additional space of land contained
 “ in the agreement, but not included in the for-
 “ mer leases therein referred to, finds, that this land
 “ must be conveyed, with all the rights, members,
 “ privileges, and appurtenances thereunto belong-
 “ ing, or which ever have been competent to the
 “ heritors of the said lands to claim and enjoy:

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“ finds, that the second feu-contract* shall also re-
 “ cite the precise terms of the second agreement
 “ entered into by the parties upon the 19th and
 “ 23d May, 1810, and that it shall in like manner
 “ narrate the whole of that agreement; and also,
 “ that the description of the subjects feued shall
 “ contain the whole subjects under lease to Milne,
 “ Cruden, and Company; and that with regard
 “ to the additional subjects thereby feued, they
 “ shall be conveyed in terms of the agreement,
 “ together with all the rights, privileges, and ap-
 “ purtenances thereto belonging, or which ever
 “ have been competent to the heritors of the said
 “ lands to claim and enjoy: finds, that the de-
 “ fender is not entitled to insert any reservation
 “ with regard to the lands feued, as to his right
 “ of cutting and quarrying stones: finds, that the
 “ clause introduced by the pursuers as to the roads
 “ ought to be adopted: finds, that with regard to
 “ the crofts of Craighaar, there is no difference
 “ betwixt the parties, as the defender consents
 “ that the clause proposed shall apply to them in
 “ terms of the lease thereof: finds, that the great
 “ anxiety of the parties seems to arise from the
 “ different views which they entertain of the effect
 “ of the clauses contained in the leases, and whe-
 “ ther the proprietor under the leases had war-
 “ ranted any other than a legal use of the water, or
 “ those rights and privileges which the proprietor
 “ upon the bank of a river is entitled to exercise:
 “ finds, that, however beneficial it might be to
 “ both parties to be acquainted with their precise
 “ rights, and the guarantee undertaken under the

* This appellation, which occurs throughout this interlocutor, is more correctly expressed in the former interlocutor by the term *feu-charter*.

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“ existing leases referred to, yet as there is no
 “ declaratory action to that effect, the Lord Or-
 “ dinary has not the means of determining that
 “ question : appoints each of the parties to pre-
 “ pare a feu-contract upon each of the agreements,
 “ in terms of this interlocutor, as the Lord Ordi-
 “ nary, in case of their differing with regard to
 “ the arrangement of the clauses, will remit to
 “ some conveyancer of eminence, to report upon
 “ the proposed deeds.”

Against this interlocutor Mr. Paton com-
 plained by representation to the Lord Ordinary,
 and twice reclaimed by petition to the whole
 Court. But the Courts respectively refused the
 prayers of the petitioner, and adhered without va-
 riation to the interlocutor pronounced. Where-
 upon Mr. Paton, the defender in the Court below,
 presented his appeal to parliament.

For the Appellants—*Mr. Wetherell* and *Mr. Heald*. For the Respondents—*the Solicitor General* and *Mr. Lumsden*.*

The Lord Chancellor. The question arising out of this case may be presented accurately, by stating, that it was, whether the Lord Ordinary in an interlocutor of the 2d of June, 1814, had rightly construed the feu-contract in question, when in his interlocutor he directed that it should be carried into execution in these words: “ And the
 “ feu-contract shall dispoise and confer all the
 “ rights and privileges contained in the leases as

* The most material of the arguments at the bar are noticed in the judgment. The reasons for and against the appeal are to be found in the printed cases.

“ to those subjects contained in the leases.” The subsequent interlocutors of the Court of Session appear to me simply to affirm what the Lord Ordinary had so directed to be done, and therefore it is only necessary to consider the effect of his interlocutor to arrive at a decision of the present question.

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The summons, according to the literal effect of it, is a summons calling upon the Appellant to execute a draft which had been drawn, pursuant to the award of Mr. Cathcart; and it called upon him also to produce *a legal and sufficient feudal title in his person*, to the “*said lands and others foresaid*.” The meaning of this must be, that he was to produce a legal and sufficient feudal title in his person, to the *lands and others foresaid privileges* which are now claimed. It was *impossible he should* ever produce a feudal title to appurtenances and privileges which do not belong to the lands. In such case, his obligation would rest only in covenant or agreement.

It struck me that it would have been very important to consider whether the Respondents could succeed at all, unless they succeeded in obtaining a decree from the Court of Session, calling upon the Appellant to execute that draft. To answer the difficulty, it was urged, that the party against whom this summons was levied, had waived the right of raising such a question; because he finally rested his defence upon the ground that he was required by the Respondents to grant certain privileges which were not within the terms or the intent of his contract. And it was farther argued, that if this Court should be

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of opinion, that, according to the true intent of the contract, the Appellant could not be required to execute such a feu, the case ought to be remitted to the Court of Session, upon the question arising out of the reference to Mr. Cathcart and his award: Because he, as an arbitrator, chosen by the parties, and upon a case settled and signed, had directed that the Appellant should execute a feu-charter according to the draft produced in process. Upon that question I am of opinion, that if the Respondents, knowing the circumstances, present their appeal here, insisting that the Appellant has waived his objection to the form of the interlocutor, as being inconsistent with the conclusion of the summons, they cannot revert to the question upon the award; and then assuming, that the Appellant has in fact waived the technical objection, the parties by their own acts have narrowed the matter of controversy, and the judgment of the House is confined to this point, what is the feu, which, according to the previous contract, the one was bound to execute, and the other to accept without reference to the award?

This suit is in substance or effect, (allowing for dissimilarities between English and Scotch proceedings), in the nature of a suit in a court of equity in England, for the specific performance of a contract. In such a suit, if it turns out that the Defendant cannot make a title to that which he has agreed to convey, the Court will not compel him to convey something less, with indemnity against the risk of eviction. The purchaser

is left to seek his remedy at law, in damages for the breach of the agreement.* In the case now under consideration, the summons prays that the Appellant may make a feudal title to the lands

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* In the English Courts of Equity, the general rule is, that a vendor shall not be compelled to give an indemnity. *Balmanno v. Lumley*, 1 Ves. & Bea. 224. The purchaser has no remedy for defect of title, but by action at law for the damage he has suffered by the non-performance of the contract. But in a case where the subject was a church lease, and the contract in effect, as construed by the Chancellor, was, that C. and his representatives should use their utmost endeavours to obtain renewals before expiration, so as to give an interest for 63 years to the vendee; and the right and interest, by such means of renewal, was to be secured to the vendee according to the contract by a covenant, binding all the real and personal assets which C. should leave at his death; and it proved, that the bulk of C.'s property was bound up by an entail, and therefore the covenant which the vendee obtained could only bind such unentailed property as C. should leave to his heir. Eldon, C. directed, that if the difference between the interest described in the particulars of sale, and that which the vendor had to give, which was in fact the difference in value between the covenants before-mentioned, could be ascertained, the purchaser should have a compensation to that amount, by abatement from the purchase money; or if the difference could not be valued, that he should have an indemnity. An inquiry was directed before a Master in Chancery, to ascertain such difference in value; and if he should be unable to do so, then he was directed to settle such security by way of indemnity, as, under all the circumstances of the title, it should appear just and reasonable that the defendant should execute, to indemnify the purchaser and those claiming under him, in case he or they should be evicted, molested, disturbed, or prevented, by reason that a title cannot be made according to the representation of the title in the particular, for the same enjoyment as if the vendor could have made good the representation, and the contract had been carried into execution accordingly. See *Milligan v. Cooke*, 16 Ves. p. 1.

The contract in this case may be considered as a contract for indemnity.

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and others. Supposing the word *others* to mean liberties: if he could make a feudal title to all the liberties in question in this cause, it would be exactly like a case in the English Courts, where the Defendant can make a title, and where he would be ordered specifically to perform his agreement.

In a case like the present, where no title can be made, it is the practice, I presume, of the Court of Session to direct, (as they seem to have done in this case), that the vendor shall make a title as far as he can; and for all that is defective; for all such parts of the contract as he cannot specifically perform, they compel him to enter into warrandice, and render himself liable in damages. The question has been argued at the bar, and is discussed in the printed papers before the House, whether that is the course which the Court of Session ought to have taken. In the view which I take of the case, it is not necessary to decide that question.

Before I advert to the several instruments upon which this question occurs, I will state what I conceive to be the settled doctrine of English Law upon the subject now in discussion. If a lease be made of a house or an estate, the lessor having no title,—and the instrument by which the lease is made contain nothing more than words of demise, with a general covenant that the lessee shall enjoy the premises, that is as long as the relation of lessor and lessee continues.—In such a case, the lessee does not usually look into the lessor's title, but he takes a covenant which binds the lessor, that he shall have the enjoyment of the thing

demised. But if that lessee afterwards becomes the purchaser of the inheritance of the estate, the consequence is, that having assumed the character of vendee, it becomes his duty to call upon the vendor to show that he can make a title to the inheritance; and, as vendee, he subjects himself to the necessity of using diligence to investigate that title which he takes or refuses, as he may be advised. With respect to covenants, he can have nothing more from that very person who, as lessor, had entered into an absolute covenant, if I may so express it, for his enjoying the premises in the relation of lessee. He can have no covenants, except such as belong to the title and interest vested in the individual who, ceasing to be lessor, takes upon himself the new character of vendor. If he claims his estate under a will, the vendor covenants only against the acts of his deviser and himself. If he claims by descent, his covenant is adapted to that species of title; but in as much as he, and those under whom he claims, had taken the title at the hazard of limited covenants, he transmits the estate and title with such limited covenants from himself; and the relation of vendor and vendee, when acquired by conveyance of the inheritance, puts an end to the covenants, though ever so large and general, which existed between lessor and lessee.

I do not presume to say, that there may not be special agreements, which might entitle the vendee to call for much larger covenants than those to which he is entitled under ordinary contracts: but, according to the established principles of the

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law, unless there be such explicit terms in the contract, giving more than ordinary covenants, he is not entitled, in his relation of vendee, to covenants so express as those which he had in his relation of lessee. Here the relation originally was that of lessor and lessee; it was afterwards to be changed into the new relation of vendor and vendee, in consideration of a certain sum, and also a feu-duty; but in the contract, there is an express liberty given to the vendee, within a certain time to extinguish that feu-duty, by becoming the purchaser, at the additional gross sum of 25 years' purchase; and therefore the feu contract is to be considered, not merely as a contract, in which the vendor was to receive the gross sum of 5,500*l.* and likewise to be paid a feu-duty; but as a contract in which the person who was to take that feu might, within a limited time, elect not to pay the feu-duty thenceforward, but by the payment of an additional sum, calculated upon the feu-duty, to become the purchaser. The question is, whether, supposing that option not to be acted upon, it is to be taken as settled, that he granted this most extensive warranty which is contended for by these Respondents. Because, if there was to be that warranty, after the purchase was made out and out, it is impossible, in my opinion, to contend that there was not to be that warranty while the feu-duty was payable.—It must be in both cases, or not at all.

With respect to the first instrument, the articles bearing date the 20th of February, 1792, it is to be observed, that they were reduced into a formal

tack in March, 1797; and that the notion of the purchase of the feu-duty did not take place till February, in the year 1810. In the mean time, according to the allegations of the printed papers, there had been an expenditure upon the premises, in matters of machinery for carrying on the business of the Respondents, of about 100,000*l.*; and the water had, with little or no interruption, except in a particular case, been enjoyed as far as the necessity of that machinery required, from the time that they first took the water out of the river Don, till the time when the feu-contract was entered into, in February 1810; a circumstance which shews, that they had had the use of the water to the extent of the supply that was necessary for machinery, which had cost, as they allege, no less than 100,000*l.* with no other interruption than the slight interruption to which I have alluded. The fact of that use, so little interrupted, is not immaterial, in considering the probability how far a purchaser in 1810 of that which he had possessed under lease ever since 1792, would or would not be inclined to give up a large and extensive warranty, if it be the real effect of the agreement of 1792 that he was to have that extensive warranty.

Upon inspection of the *agreement of 1792*, it is to be observed, that the whole of the first article is confined in its terms to the agreement to set and let in tack the lands; there is not in this first article a single word about privileges or appurtenances, or *others*; the words which are usually engrossed in the formal conveyance; yet

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no lawyer can doubt, that, if this first article was to be specifically performed, and a tack set of those lands accordingly, the scroll of tacks, if regularly drawn out in implement of that article, would have conveyed with those lands for the term all the privileges, and so forth, which, (to use a term we frequently employ on these occasions) *belonged to the lands*. Although no mention whatever is made of the privileges which belong to the land, upon an agreement to make a tack, the privileges belonging to the land are included by operation of law, and ought to be expressed in the tack.

The second article applies to privileges which cannot belong to lands, lying very near the river Don. That the owner of these lands might be intitled to certain uses of the river, as privileges belonging to the situation, is not difficult to believe; but that he should have as privileges belonging to the lands, such a privilege as the second article professes to confer, appears to me incredible. The words used in that article are so large, that, upon repeated questions addressed to the Bar, no person has been able to state the precise meaning of them.

In the printed papers, (which I have read very carefully) as well as at the Bar, it has been contended, that this article has not the extensive sense in which the Respondents construe it; but more extensive words I think cannot be used. Where the Appellant means to restrict his grant within the limits of his power, he does so in words, for in granting a right to a passage boat

to cross the river opposite to the grounds; he expresses his intention to give that only, as far as he has it to give. Such a restrictive precaution he does not apply to "the privilege and liberty of taking in water from the river Don;" but he says, expressly, "that they shall have the liberty of taking in water from the river Don, for the purpose of driving machinery and other uses, and of cutting canals through the said grounds, as they shall judge necessary."

"Again, as to the privilege of quarrying stones, to be used on such parts of the hill of Grand-home as shall not happen to be planted or improved;" that is a privilege which cannot possibly belong to the land. The privilege of quarrying on my estate could not belong to land, part of my estate demised by lease; it could not be a privilege inherent or belonging to the lands so demised. The right of cutting a canal through the grounds, which is given by a subsequent article, is another liberty which could not possibly be inherent in the lands demised.

Upon that part of the articles by which it is agreed, that the lands demised shall be paid for at a certain rate per acre, much observation is made in the papers; and it has been suggested also at the Bar, with respect to the instrument relating to the lands first demised, that a money payment is to be made for the land of so much for each acre, and that therefore it is distinguishable from that other instrument which has been made the subject of comment, in which a sum is expressly given for the liberty of taking the water. But

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those observations and arguments are founded in too much nicety of distinction. Can it be supposed, that because this 3*l.* per acre is to be given for the land only, the parties did not mean that as a compensation for all that the one was to grant, and the other to enjoy under the agreement and the lease, which was to follow. Although there is no separation between the different parts of this 3*l.* sterling for the land, and the liberties to be granted, it would be extravagant to say that the lessee did not contemplate the advantage he was to receive from the whole he had stipulated to enjoy under that lease. At the same time, it does not appear to me ultimately to make any difference in the construction of the instruments, or the decision of this case.

There is much argument in the papers on both sides, with respect to the effect of the clause in the articles, which provides for the building of the bleach field, and the price to be given for it at the end of the term. On the one hand it is contended, that, as the Appellant is to pay only 500*l.* at the end of this term for all he was to take, he had a valuable consideration to look to, if he continued to be the lessor to the end of the term, which he would not have, if he was to be considered as feuing in perpetuity. On the other hand it is answered, that the lessees might strip or denude these buildings of all the machinery in them, and leave only the naked walls. Undoubtedly the difference of consideration is very great between the walls with the machinery, and the walls only, without the machinery.

In more than one of these articles allusion is made to certain cruives; and rights are reserved by the Appellant, with a view to their maintenance. The cruives, I suppose, were fishing cruives in this river, of which it is contended these articles are so improvident as to entitle the lessees utterly to destroy the value. Under these circumstances, a question would arise, whether the agreement, even according to the articles, must not be construed as giving so much of the water of the Don as to leave the cruives for the fisheries uninjured.

According to my construction of this agreement, the Appellant had exceeded his powers; he had agreed somehow or other to secure, whether by covenant or warrantice, or otherwise, "the privilege and liberty of taking in water from the river Don, for the purpose of driving machinery, and other uses, and of cutting canals through the grounds, as the Respondents should judge necessary;" a most improvident agreement to warrant a privilege which perhaps he could not secure, and for the failure of which he must be answerable in damages, if the Respondents were disturbed in their enjoyment. If, under these circumstances, the inheritance had been purchased by the lessee, no doubt such a purchase might have been so managed, as to prevent a merger of the lease; but, in the absence of special provision, there would have been a merger of the lease, and the lessee having become the purchaser, would in law have taken upon himself all the obligations by which the former owner of the

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inheritance had bound himself to his lessee; in other words the *quondam* lessee, in his new character of purchaser, would be the person to warrant to himself the liberties and privileges which the former lessor had agreed to assure to him, as long as the old relation of lessor and lessee continued. Undoubtedly the vendor might have conceded the advantage which by law he derived from the new relation of vendor and vendee; and, as the purchase was a matter of option, the vendor might have warranted, at the risk of any damages which could be recovered against him, those liberties and privileges which he as lessor had agreed to give the Respondents as lessees. But, according to our law, and in all laws which rest on principle, such a contract between vendor and vendee must be expressed in terms which are free from all doubt or ambiguity. The terms of a contract so special must indicate, unequivocally, what was the intention of the parties.

In the case before us, it must be remembered, that the contract provided an option for the Respondents, either to pay a feu-duty in perpetuity, or that they might redeem the duties at so many years' purchase, within a given time after the feu-contract was executed, and yet the special contract is supposed to be this, that after vesting the inheritance in the vendee for ever, the vendor was for ever to continue liable for all the damages which might be incurred by the vendee, in the exercise of the privileges and liberties in question. That a man may make such a covenant I do not

deny; but when the question is, whether he has made it; the terms of the contract should leave no room for doubt.

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In the tack made in the year 1797, the demise is of the lands, “with the privilege and liberty to the said tacksmen and their foresaids, of taking in water from the river Don, for the purpose of driving machinery and other uses, and of cutting canals through the said grounds, as they shall judge necessary.” Upon this lease there can be no doubt, and improvident as it was for the Appellant as lessor to enter into such a warranty as he did in this lease, yet if that is clear upon the terms of the instrument, he must abide by his contract. Now in this lease, to remove all doubt as to the privileges and liberties intended to be granted, they insert these special words, “together with the whole liberties and privileges in favour of the said tacksmen,” (not *belonging to lands*, but) “particularly specified in the articles and conditions of lease above-mentioned, to which reference is hereby had for that purpose, and which shall remain as effectual and as binding upon the said John Paton and his foresaids, as if the same had been again herein particularly enumerated and expressed.” In this instance, there is a contract specifically executed, according to terms which leave no doubt, and it is a contract between the same parties, who had, or might have had, that transaction in their memory. If, upon framing the feu-contract, it had been expressly stipulated, that the Appellant was to warrant or feu the privileges and

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liberties, (not merely belonging to the land, but the liberties and privileges) *particularly specified in the articles or conditions of lease*, as though they had been there particularly enumerated, or all the privileges and liberties *mentioned in the tack itself*, as if they had been in the feu-contract particularly enumerated, no doubt could have arisen. In the opinion of my Lord Alloway, (an opinion which deserves our respect,) as well as that of the Court of Session; the words, *privileges belonging to the lands*, have not so extensive a meaning as the Respondents suppose and argue. Can the words, "*privileges and liberties belonging to the lands*," appearing in a feu-contract, be applied not only to what was in the instrument, but to what was not in the instrument? In a case where it is of necessity that the claimant should shew the plainest and most unambiguous terms, can he have more than privileges which belong to the lands, where he stipulates in terms which are admitted to describe *prima facie*, nothing but privileges which do belong to the lands?

It is not immaterial to observe, that in another part of the instrument now under consideration, the Respondents are bound "to implement, perform, and fulfil the whole other obligations, prestations, and conditions, incumbent upon them as tacksmen, contained in the foresaid articles and conditions of tack." I refer to that part of the case, because these are articles of tack, which grant not only privileges beyond those which belong to the lands, but they are articles of tack which contain a great many reservations to

the owner, with respect to his enjoyment of the lands leased, and other estates belonging to him. If he has entered into a feu-contract, which puts an end to those reservations, he must abide by the consequences of a feu-contract so drawn up. I do not say that he has done so, but the words of the instrument are to be weighed, and the parties must abide by what they have expressed, although it be contrary to what they meant.

By the feu-contract, after the recital of the leases, grants, and agreements, and a description of the premises, it is agreed, that the Appellant shall establish and make out a good and satisfactory title in his own person, as heritable proprietor of the lands aforesaid, which would bring an obligation upon him to make out a good title to those lands, as heritable proprietor of them, and such title would carry with it a good title to all the privileges belonging to the lands. But how he is to make a good title to privileges not belonging to the lands, I do not comprehend. He may warrant the privileges, and *agree* to make a title to them, but if they do not belong to him, how is he to fulfil such an obligation specifically?

The parties to this contract had before them the tack and the articles of agreement; which articles of agreement enumerated all those privileges which are now the subject of litigation; and in a separate article from that which would have carried the privileges incident or belonging to the land. In the contract which followed, the Respondents had expressly, in one part of it, (in order to remove all doubt), provided that

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they were to have all the privileges, liberties, &c. &c. which were mentioned in the articles specified in that contract, and that as largely and specifically as if they were therein particularly enumerated. Is it consistent with this conduct, that when they were making a feu-contract upon the lands comprised in the leases, now in question, and when they used only the words "privileges *belonging to the lands,*" that they could have intended to affect the relation of proprietor and vendee with the same obligations which by contract attached upon the relation of lessor and lessee. If such had been the intention, they had only to repeat, *totidem verbis*, the words to be found in the tack which followed upon the articles; and such a special contract, when carried into execution, would have comprised reservations with respect to the estate, the subject of the tack, which were beneficial to the Appellant, as owner of the land.

I do not forget the words which are added, "with all the rights, members, privileges and appurtenances thereunto belonging, or which ever have been competent to the heritor of the lands to claim and enjoy." If it has been competent to the heritor of the lands to claim and enjoy the privilege of drawing water from the Don, it is a privilege thereto belonging; and if the Respondent takes the feu-charter in the very terms in which this feu-contract is expressed, he will have that privilege. On the other hand, if the privilege of drawing the water is not a privilege belonging to the lands, or not a privilege which it was ever competent to the heritor of the lands *qua* heritor of the lands to

claim and enjoy, you have not that privilege, unless those words enable you to claim a privilege not competent to the heritor of the land to claim and enjoy. As to ~~the~~ additional words expressing that it is "the intention of the parties, that all "rights and privileges of or belonging to *the lands* "formerly leased to Leys, Brebner, and Hadden, "&c. shall now be finally and for ever conveyed "by Paton to Brebner and Hadden, their heirs, "and executors, and assigns, or as they shall "direct," it is said that they mean not the *lands* formerly leased, but the *rights and privileges formerly leased*; and in order to shew that this does not mean the lands formerly leased, but the rights and privileges formerly leased, we are referred to the words in former contracts between the parties, in order to gather from them the construction of these words in the feu-contract. Considering the words in question in this point of view, I observe, that in the year 1792, the parties agreed by articles that a tack should be made. In the year 1797 a tack was accordingly executed. In order to avoid all question, they included in that tack by special words all the liberties and privileges granted in those articles. It was quite unnecessary upon this transaction in the year 1797, to consider, whether these were rights and privileges belonging to the lands or not, for the parties had agreed, as lessor and lessee, that the lessee should have those privileges, whether he could have them by way of tack, by way of agreement, or only in compensation for damages. When they came to make this feu-contract, the inference I draw from the ab-

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sence of these special words, and of the reference to the lease and articles, is, that they had agreed not to insert those words, although they were lying before them. The natural import of the words is this,—If these are rights and privileges belonging to the lands, and which, as the heritor, I can grant, you will have them:—If they are rights and privileges which I cannot give to you, as vendor of the estate, without entering into those special covenants, then you will not have them. We will not determine whether they are of the one nature or the other, if they are of such a nature that they can be said to belong to the lands leased, you have them:—If they are not of such a nature as to belong to the lands leased, but your rights are to depend upon a personal covenant, that is not what I mean to give; and therefore, instead of using those words which I find in the articles and in the tack, I will use more cautious and restrictive words.

Such appears to me to be the right construction of the instrument, and I think the words used do not include the privilege claimed. I am the more confirmed in that opinion when I consider that part of this instrument by which the Respondents have an option to redeem the annual feuduty, and purchase the inheritance upon paying a consideration about equal to a sum of 12,300*l*. Under these circumstances it is supposed that the Appellant entered into a contract to deliver over the inheritance of the lands to the Respondents, with a covenant, binding him to all eternity to secure to the new owners the use of

the water of the Don, not only for the purpose of machinery, upon which they state that they had laid out 100,000*l.* prior to this feu-contract, but for *other* purposes, and to such unlimited extent as they might think proper to employ that water for machinery, and for other purposes which, to this moment, have neither been defined nor ascertained. According to the literal import of the articles and the tack, the Respondents are to exercise uncontrouled power over the river, under the guarantee of the Appellant, and at his risk.

To the objection that this is an extravagant warranty, which it is hardly credible a man parting with the inheritance of lands should agree to give, it is answered, that he did warrant the same privilege for 99 years. That is undoubtedly an improvident undertaking, but nothing like the improvidence of a guarantee of such a privilege in perpetuity. On the other hand, when the Respondents became the heritors of the lands, it is not unreasonable to suppose, that having purchased the inheritance, they took upon themselves the bargain and warranty of their lessor. He had by agreement bound himself by warranty for 99 years; and from the year 1792 to 1797, the Respondents, under that agreement and the lease which followed, had taken water for the supply of their extensive machinery, without disturbance, except in a trifling instance. But upon the new contract for purchase of the inheritance, the question is, Whether the Respondents by the specialties of their contract, have precluded the application of that rule which governs such transactions be-

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tween the vendor and vendee of an inheritance, that the vendee takes upon himself the relation of the vendor with respect to lessees, and as to claims which the vendor had created, unless the terms of the agreement expressly shut out the application of such a rule to his case.

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23, 1810,
ante, p. 55.

As to the other feu-contract, if that by express terms binds the Appellant to perpetual warranty, upon which I give no opinion, are we to say that, because one agreement operates by express terms, the same construction is to be put upon the other agreement which has no such terms, and where the parties think proper to use precisely the same terms, with respect to the premises which never were in lease,* as with respect to those which were?

The case does not require any judgment to be given upon the construction of the feu-contract. The only question now at issue is, How it shall be carried into execution? That will be most properly done by transferring to the proposed feu-charter the very terms respecting rights and privileges which were used, and are to be found in the contract. The question, what are the rights and privileges which pass under the terms contained in the feu-charter, may then become the subject of actions of *declaratur*; and the Court of Session, sitting as a Court of Equity, must consider

* This observation relates to a grant of three acres of land, not before in lease, which are included in the agreement of the 3d and 9th of February, 1810. In abstracting the deeds which form the ground-work of the case, this material passage was omitted, partly from inadvertence and partly from the desire of curtailment.

whether they will be justified in the conclusion that the recital appears to be for the purpose of ascertaining what rights and privileges are to be conveyed, and that the rights and privileges in question are such as do not belong to the lands; or whether they can safely determine, from the words which are to be found in this feu-contract, that it was the intention of the parties to include in their agreement not only the rights and privileges which belong to the lands, but the rights and privileges which are claimed. If the parties do not come to some compromise upon that question, the conveyance must be submitted to the Court of Session, to consider and decide, whether the great privilege which is the subject of dispute does pass by it or not. In my opinion, it does not pass. But the opinion thus given is extra-judicial. It cannot interfere with the rights of the parties to agitate that question. If hereafter the Court shall say, this is a liberty and privilege belonging to the lands, the Appellant must abide by that decision, because he has agreed to grant the liberties and the privileges belonging to the lands; and even supposing it not to be a right and privilege belonging to the lands, yet, if upon consideration of the special words of the recital, it can be inferred that the Appellant has bound himself by agreement, he must, in that case, also convey the rights and privileges, which come within the terms of his agreement, though not belonging to the lands.

Whenever the question shall arise as to the right construction of the conveyance so executed, it will be matter of consideration on the one hand,

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how far it was the intention of the Appellant to part with an inheritance affected by the same terms and conditions, which affected that estate under the lease; or on the other hand to withhold what was granted by the lease.

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With respect to the medium of proof assumed in the Court below, it may be remarked as singular, that although the two agreements were separated in the progress, yet one of them was admitted as evidence to assist in the construction of the other; and the judicial conclusion is, that because *the one* agreement has words which in the judgment of the Court conveyed, or meant to convey, certain rights, therefore *the other* agreement must be considered to have embodied in it the same intention, although different words are used.

It appears to me upon the whole, that if the interlocutor of the Lord Ordinary is altered, by striking out the words in italics,* and by declaring that, instead of those words in italics being inserted, this conveyance ought to be made in the very terms of the feu-contract, that alteration will be sufficient, and that is an alteration which the rights of the parties require.

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The judgment of the House was given according to the suggestion of the Lord Chancellor, with the alterations proposed by him as above stated.

* The words are, "and the feu-contract shall dispose and confer all the rights and privileges contained in the leases, as to those subjects contained in the leases."

SCOTLAND..

APPEAL FROM THE COURT OF SESSION.

TASKER *Appellant.*CUNNINGHAME AND OTHERS *Respondents.*

A determination made by an agent duly authorised or acknowledged not to sail upon the voyage insured, but upon a different voyage, is an abandonment, and discharges the underwriters.

Correspondents at Cadiz, of ship-owners in England, having received directions to ballast and freight a ship for the Clyde, suggest a slight variance as to the port of destination, which the owners adopt by insuring the ship and cargo for a voyage, including the port named and fixed by their agents. Soon afterwards, the agents at Cadiz informed the owners that, owing to a change of circumstances, and with the advice and concurrence of the captain, they have determined not to send the ship according to their former suggestion (*i. e.* upon the voyage insured), but direct to Newfoundland. Eight days after this new determination, the ship is stranded in the bay of Cadiz, and burnt by the French army. The several letters containing intelligence of the new alteration of the voyage and of the loss of the ship, arrived in England, and were received by the owners upon the same day.

The House of Lords reversing the judgments of the Court below, decided, that the correspondents at Cadiz were the agents of the Respondents; that the voyage insured was abandoned by their determination to send the ship on a different voyage, and therefore that the underwriters were not liable for the loss. The consequence of this decision being that the owners were bound to refund to the underwriters, with interest, monies which had been paid by them before they were apprised of the facts.

THE Respondents, who were engaged in the Newfoundland trade, expecting one of their vessels, called the *Henrietta*, to arrive with a cargo of fish, at Cadiz, in the beginning of the year

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1810, directed Messrs. Lynch and Co. their agents at that place, as soon as the cargo should be discharged, to ballast the vessel with salt, and to endeavour to procure freight *for her to Clyde*. The vessel arrived at Cadiz about the time expected, but the French army having taken possession of the salt-pans in that neighbourhood, it was not in the power of Lynch and Co. to comply with the Respondents' instructions. Under these circumstances, they resolved, with the approbation of the ship-master, to dispatch the vessel *for Liverpool*, in place of Clyde. Of this change in the destination of the vessel, Messrs. Lynch and Co. advised the Respondents, by a letter dated the 16th of January, 1810. By a letter dated the 10th of February, from the same persons to the Respondents, the cause of this variation is assigned in the following terms: "I have, at last, sold the Elizabeth's cargo, at 3½ per quintal, &c. As to the Henrietta's, I could not get a purchaser for the whole, so that begun to retail it at five dollars, at which I hope to run the whole off shortly. As the French have got possession of all the salt-pans in the neighbourhood, I cannot ship any salt in these vessels, so that will set them up for Liverpool (where can get salt) with a prospect of getting full freight without much delay."

It was necessary that a cargo of salt should be sent out to Newfoundland early in the spring, for the supply of the fishery, and salt could only be procured at the port of Liverpool. Messrs. Lynch's letter, acquainting the Respondents with their in-

tentions, was written while the fish cargo was yet on board. After the receipt of it, and upon the 12th of March, the Respondents effected a policy of insurance upon the voyage *at and from Cadiz* to her *port of discharge in St. George's Channel*, including Clyde, which was underwritten by the Appellant to the extent of 100*l*.

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Circumstances afterwards occurred which induced Messrs. Lynch and the ship-master again to alter the destination of the vessel. The sale and delivery of the cargo had been protracted so long, as to give reason to apprehend that, if the vessel proceeded to Liverpool to load salt, the supply of that article would not reach Newfoundland at the proper season in spring; and, in the mean time, the French had retired from the salt-pans at Cadiz, so that a cargo of salt could readily be obtained there.

Messrs. Lynch and Co. therefore, after consulting with the master of the *Henrietta*, and with the master of another vessel belonging to the Respondents, deemed it for the interest of the Respondents to dispatch the *Henrietta* direct to *Newfoundland*; and as it was necessary to give immediate information to the Respondents, of this change in the destination of the vessel, to the end that they might effect insurance on the *new voyage*, they, on the 28th February, 1810, wrote to the Respondents in the following terms: “ In consequence of the unprecedented want of small craft, “ nay, the general confusion that has prevailed “ since the French appeared in this neighbourhood, “ the delivery of the *Elizabeth's* cargo has been

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“ delayed until now ; and as it is likely the Hen-
 “ rietta will be detained from the same causes,
 “ until the end of the month, *Captain Collins has,*
 “ after consulting with Captain Fields, *determined*
 “ *to return direct to St. John’s, with a cargo of*
 “ *salt, now to be had at double price, which let*
 “ *serve for your Government.*” Eight days after
 the date of this letter, while the vessel was lying
 at Cadiz, she was driven on shore in a storm, and
 burnt by the French. The letter of the 28th of
 February, and another letter conveying the intel-
 ligence of the loss, were received by the Re-
 spondents on the same day, viz. upon the 21st of
 April, 1810.

In these circumstances the Respondents did not
 communicate to the Appellant, or the other under-
 writers, the letter which they had received from
 Lynch and Co. respecting the projected alteration
 of the voyage, but obtained payment from them for
 a total loss. The fact having afterwards come to
 the knowledge of the underwriters, they applied,
 by letter, to the Respondents for repetition
 (repayment) of the money so paid to them, which
 being refused, the Appellant brought an action
 before the High Court of Admiralty, in
 which he concluded, that “ the said Cunning-
 “ hame, Stevenson, and Co. and John Bell,
 “ merchant, in Glasgow, an individual partner of
 “ the said company, should be deemed and or-
 “ dained, by decree and sentence of the Judge
 “ of our said High Court of Admiralty, to make
 “ payment, conjunctly and severally, to the com-
 “ plainor, of the sum of 94*l.* 10*s.* sterling, toge-

“ ther with the due and lawful interest of the said
 “ sum, from and since the 11th day of October,
 “ 1810, and while payment, and also for ex-
 “ pences.”

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After various proceedings in the suit, the Judge Admiral pronounced the following interlocutor.—“ May 13, 1813, The Judge Admi-
 “ ral having advised the libel, the defences, an-
 “ swers, and whole writings produced, finds, that
 “ the defenders were concerned in the ship Hen-
 “ rietta, commanded by Captain Collins, expect-
 “ ed at Cadiz, with a cargo of fish, about January
 “ 1810; and that they gave orders in 1809, to
 “ Lynch and Co. their agents at Cadiz, to load
 “ the Henrietta with a cargo for Britain, as soon
 “ as her cargo of fish could be discharged: finds,
 “ that the defenders received letters from Lynch
 “ and Co. notifying that said vessel was to be
 “ loaded for Liverpool, in consequence of which
 “ the defenders insured her at and from Cadiz to
 “ Great Britain, and of course, the voyage then
 “ intended was *bonâ fide* insured: finds, that by
 “ the same post they received from Lynch and
 “ Co. a letter, dated the 28th of February, and
 “ another dated the 12th of March, both in the
 “ year 1810, the former announcing an intention
 “ in Captain Collins not to sail for Britain, but
 “ for Newfoundland, and the other intimating
 “ the total loss of the Henrietta, while still in the
 “ bay of Cadiz, and when a small part of her
 “ loading only had been delivered, and, of course,
 “ before she was in a state to sail on any voyage:
 “ finds, that as the projected voyage to New-

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“ foundland might have been countermanded by
“ the defenders, or even as Captain Collins might
“ again have altered his intentions, without any
“ such orders, and the voyage insured might
“ have been commenced, if the vessel had not
“ been lost in the bay of Cadiz, there is no evi-
“ dence of an actual abandonment by the de-
“ fenders, nor even by their captain, of the
“ voyage insured, nor of *mala fides*, in any re-
“ spect, and, therefore, sustains the defences,
“ assoilzies the defenders, and finds them entitled
“ to expences.”

The Appellant having brought this judgment under review of the Court of Session by process of suspension and reduction, and the cause having come before Lord Pitmilley, Ordinary, his Lordship, after various proceedings, pronounced the following interlocutor:—“ The Lord Or-
“ dinary having considered the memorial of
“ the suspender, with the memorial of the de-
“ fenders in the conjoined actions, and whole
“ process; in respect the resolution taken by
“ the defenders’ shipmaster, Captain Collins,
“ to return direct to St. John’s, instead of pro-
“ ceeding on the voyage insured, as communi-
“ cated to the defenders by their agent, Mr.
“ Lynch, in his letter of 28th February, 1810,
“ was *not consented to, or judged of by the de-*
“ *fenders*, the owners, and insurers of the vessel;
“ and *no step whatever* was taken between the
“ date of the letter referred to, and the total loss
“ of the cargo (eight days thereafter), to carry
“ the captain’s resolution into effect, very small

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“ part only of the former cargo having been
 “ landed, and no preparations having been made
 “ for a new voyage in the intermediate period;
 “ finds, that the circumstances founded on by the
 “ pursuer, do not amount to an abandonment of
 “ the voyage insured. Finds, therefore, that it is
 “ unnecessary to allow a proof of the pursuer’s
 “ allegation, that where a particular voyage has
 “ been insured, and afterwards abandoned, the
 “ underwriter is not entitled to the premium.
 “ In the reduction sustains the defences, and
 “ assoilzies the defenders, and in the suspension
 “ finds the letters orderly proceeded, and de-
 “ cerns.”

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A representation was made by the Appellant; but the Lord Ordinary, by interlocutor, dated the 28th of February, 1815, adhered to his former decision.

Against these interlocutors the Appellant reclaimed by two successive petitions to the second division of the court; but the court being of opinion, that there was no evidence that the voyage to Britain was abandoned, the Lords, by two successive interlocutors, dated respectively the 17th of January, and the 16th of February, 1816, adhered to the interlocutors complained of.

From these several interlocutors of the Judge Admiral, the Lord Ordinary, and the Second Division of the Court of Session, the Appellant presented his appeal to the House of Peers.

For the Appellants, *the Solicitor General* and *Mr. Adam*.—In this case there was a substitution

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of one voyage for another, made by persons having authority as agents by law and usage, and recognized by the Respondents. By the determination of the agent the voyage was altered, and the liability of the underwriters ceased. This is totally different from a case of intended deviation, where a loss happens before the ship arrives at the point of intended deviation. There can be no such deviation from a voyage which never was intended. Here the voyage insured was abandoned, and another was substituted. The abandonment once made operates immediately to release the underwriters. *Chitty v. Selwyn*, 2 *Atk.** No step taken towards the voyage is necessary. Intention is sufficient to constitute a new voyage. The voyage insured rested

* In *Chitty v. Selwyn*, the only matter decided was, that a commission should issue to examine witnesses abroad, and an injunction until, &c. But Lord Hardwicke C. *obiter* said, "When a ship is insured at and from a place, and it arrives at that place, as long as the ship is preparing for the voyage upon which it is insured, the insurer is liable. But if all thoughts of the voyage are laid aside, and the ship lies there five, six, or seven years, with the owner's privity, it shall never be said that the insurer is liable."

In *Way v. Modigliani*, the ship had actually proceeded on a different voyage. But there is a case, *Wooldridge v. Boydell*, Doug. Rep. 16, where, (according to the judgment of Buller, J. in the above case) "It was held, that if a ship insured for one voyage sail upon another, and the track in the outset of the voyage is the same, and she be taken before she arrive at the dividing point of the two voyages, the policy is discharged." There it was no more than intention. If she had arrived at the dividing point, the original voyage, according to the original intention, might have been resumed, yet the right under the policy would not have revived.

merely in intention. Suppose the letter announcing the alteration had arrived before the intelligence of the loss, and an insurance had been made on the intended new voyage, the liability upon the original insurance would not have continued. *Way v. Modigliani*, 2 T. R. 30.

After the determination to abandon the voyage insured, the underwriters could not have recovered the premium. *Long v. Allen*, B. R. Easter, 25 Geo. 3. That is the law and usage in Scotland, as well as England. The Respondents acknowledge the fact. It is alleged, and they have not denied it. But as the premium is the consideration for the insurance, if the right to the premium fails, the right to the indemnity must also fail.

The Appellant having paid the loss, when ignorant of the facts, the money is by law recoverable.

For the Respondents—*Mr. Scarlett* and *Mr. Wetherell*. The policy in this case attached from the moment when the ship moored at Cadiz. Where a policy once attaches, no intention to deviate or alter the voyage can affect the policy, if a loss happens before any act is done towards effectuating the intention. Intention, unaccompanied by an act, is in its nature mutable. Suppose the agents had afterwards, and before the cargo was discharged, announced a further intention to revert to the voyage insured; the owners in the mean time having effected a policy on or before the 12th of March, would the momentary intention have destroyed the policy? Policies continue binding so long as no act is done to com-

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mence a new risk. In *Way v. Modigliani*, the policy was to take effect from a given day, before which the ship had sailed on a different voyage, and the risk never commenced. The case of *Long v. Allen*,* rightly considered, is in favour of the Respondents. The policy in that case being upon a voyage *at* and from Jamaica, the risk commenced by virtue of the word "*at*." If the ship had been lost at Jamaica, the underwriters would have been liable; and therefore, on principle, they would on such a policy have been entitled to recover the whole premium. But the evidence of usage prevailed: an usage that, where the voyage is altered, $\frac{1}{4}$ per cent of the premium is to be retained. If the policy had not been *at* and from, &c. the underwriters would not have been entitled to any part of the premium. There is not a case to be found in the Reports, nor a principle in the text-writers to support the notion that a policy which has once attached can be dis-

* In *Long v. Allen*, the action was for a return of premium. The jury gave a special verdict, finding an usage, upon which the Court grounded their judgment when the case was argued. The finding of usage superseded the necessity of the question of apportionment. But Lord Mansfield observed, "The law is clear, that if the risk be commenced, there shall be no return of premium. Hence questions arise of distinct risks insured by one policy or instrument. My opinion has been to divide the risks. I am aware, that there are great difficulties in the way of apportionments, and therefore the Court has sometimes leaned against them." See *Meyer v. Gregson*, Park on Insurance, p. 588, 7th edit.

In the case now reported, the insurance was *at* and from Cadiz, &c.; but the destination was altered and the ship lost before the policy was underwritten.

charged, but by actual deviation, or some act done to alter the risk, some act as contradistinguished from intention. In *Chitty v. Selwyn*, the ship was detained longer than was necessary to accomplish the voyage first insured. That was equivalent to an act. The underwriters were discharged by unreasonable delay. In that case, if the loss had happened before the discharge of the cargo, or before the time of necessary detention had elapsed, the underwriters would have remained liable. In our case, the cargo had not been delivered. If the ship had discharged her cargo, and taken new freight, that would have been an act sufficient to alter the voyage; but mere intention is insufficient. Call it determination, it is the same thing, if not carried into effect. Suppose the intention had not been communicated, but had rested in the mind of the agent, could that alter the voyage? But if it is not altered by the mere uncommunicated determination, how does the communication aid the case? Intention, determination, and communication are of the same nature; they are not acts.

The two letters having been received on the same day, the owner could have made no insurance upon the new risk, which would have been a great hardship. If the mere intention of a captain or agent can alter the risk and the voyage insured, an owner could never know whether he had effected a valid insurance. Such an intention, if carried into effect without the approbation of the owners, would be barratry in the captain. *Earle v. Rowcroft*, 8 East, 126.

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The Solicitor-General in reply.—To constitute barratry, the act of the captain must be fraudulent. Here it was for the benefit of the owners. Determination by persons duly authorised is sufficient to alter the voyage—subsequent acts are only proof of the intention. If the owners had insured the new voyage, the new underwriters would have been liable, yet this would not have been an act in any other sense than as the determination of the authorized agent is an act.

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The Lord Chancellor.—The want of consent on the part of the owners cannot be suffered to stand as a reason for the interlocutor, pronounced by the Lord Ordinary, if the judgment itself could be affirmed. That no step was taken between the date of the letter, announcing the new voyage and the loss of the cargo; that a small part only of the former cargo was discharged, and no preparations made for the new voyage, are facts assumed in the Court below, as the ground of judgment. But there is no trace in the proceedings of any proof of these facts. It seems by the course of argument adopted in the cases, as if these facts were to be taken for granted. In the proceedings before the Judge Admiral, and in the letters of suspension, it is alleged that there was an arrangement as to the price of salt to be taken at Cadiz, and the means of taking it. But there is no proof to support those allegations.

Upon the question of barratry it is material to consider the instructions given, and how far, according to a literal construction, they sanction what was done by the parties acting under them.

By a passage in the letter of the 10th of February, it appears that the agents then had an opinion that the vessel would be very speedily unloaded. By the following passage of that letter, they intimate their intention of sending the vessel to Liverpool, and the owners adopt that determination by insuring accordingly for the Channel, comprehending Clyde. The Captain also apprises his owners of the same determination, and by an expression to be found in the letter of the 28th of February, it appears, that upon the new determination which the agents and captain had adopted again to alter the voyage, notice was communicated to their employers for the purpose of guiding them as to the insurance which it would be necessary to effect.

I do not at present enter upon the discussion of the difference between intention and determination. If the matter upon the evidence can be supposed to rest in mere intention, the interlocutor must be altered so far as it assumes actual consent of the owners to be necessary. For it appears throughout the correspondence, that the captain and the agents had taken upon themselves to direct or alter the destination of the ship, with the acquiescence at least of the owners. The risk here insured was not merely on the voyage, but *at and from* the port of Cadiz, &c. Upon such policies difficult questions arise as to the commencement of the risk, and the return of premium. But where the voyage has been abandoned before the commencement of the risk, it is impossible to contend that the premium could be claimed. What amounts to abandonment is a different question.

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By a letter dated the 11th of Feb omitted in the statement of the facts.

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When a ship is insured *at* and from a given port, the probable continuance of the ship in that port is in the contemplation of the parties to the contract. If the owners, or persons having authority from them, change their intention, and the ship is delayed in that port for the purpose of altering the voyage and taking in a different cargo, the underwriters run an additional risk if such a change of intention is not to affect the contract. The substantial question in this case is, whether any declaration is to be found in the correspondence that the voyage insured was in fact abandoned. I will not, at present, advise the House to proceed to the decision of a question upon which very nice distinctions have been taken. The judgment may be for a few days deferred, and in the mean time I will confer with a judge, whose attention has been much occupied with these subjects.

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Lord Chancellor.—The interlocutor in this case, is in substance, that the assured is intitled to recover against the underwriters for a loss of the ship. The question arises upon a policy of insurance effected by the Respondents, on the ship *Henrietta*, *at and from* Cadiz. The Respondents, on the 24th of November, 1809, wrote to their correspondents at Cadiz, Messrs. T. and H. Lynch and Co. a letter containing instructions respecting the *Henrietta*. Lynch and Co., by their answer, dated the 16th of January, for a cause explained in a subsequent letter, suggest that the destination of the vessel on its homeward voyage should be varied. By a letter dated the 10th of February,

they inform the Respondents that "as the French " have got possession of all the salt-pans in the " neighbourhood of Cadiz, they will set up the " vessels (one of which is the Henrietta) for Liverpool," where salt may be procured. The captain also, by a letter of the 11th of February, informs his owners, the Respondents, that, for the reason before assigned, the agents mean to load the vessel for Liverpool. It appears, therefore, that the agents advise their principals that they do not intend to follow their instructions. These two letters* of the 10th and 11th of February reached Port Glasgow the 9th of March. On the 12th of March the Respondents effect a policy of insurance upon the vessel, adopting this variance in the destination. The insurance is effected on the vessel, "at and from Cadiz to her port of discharge in St. George's Channel, &c." comprehending Clyde. Without adverting to the cases of apportionment, it is clear, that though a ship is insured *at and from* a certain port, it is insured with a view to the probable continuance of the vessel at that port, and the voyage on which it is to be employed. For, according to the voyage, the continuance and delay in port may differ. Upon the 28th of February, these same agents dispatched another letter to the Respondents, whereby, after noticing the delay which, contrary to their expectations, had already taken place, and the further delay in the delivery of the cargo,

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* The Lord Chancellor read the letters in moving judgment; but as the letter of the agents has already been given in the statement of the facts of the case, it is not here repeated. The letter of the captain was to the same effect.

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which was likely to ensue, they add this important passage :—“ *Captain C. has determined to return direct to St. John’s with a cargo of salt, now to be had at double the usual price, which let serve for your government.*” By a letter dated the 12th of March, and which came to hand on the same day as the letter of the 28th of February, the Respondents received advice of the loss of the ship insured. The interlocutor of the Lord Ordinary contains a declaration which is now given up as untenable, viz. that the owners had not consented to the alteration of the voyage. As the letter announcing the change came to hand after the loss of the ship, they could not give actual consent. But the agents and captain had, on a former occasion, made alterations respecting the voyage, and the owners acquiesced in, and acted upon their advice and determination. The owners had therefore undoubtedly constituted them agents, with authority to alter the destination of the ship. It is alleged that a small part only of the cargo was delivered before the loss; and it is contended, that as there was nothing to alter the voyage, but intention which might have been again varied, and as there was no progress made in unloading the cargo, nor any other act done towards a change of voyage; this is to be considered as resting in mere intention, and that the loss must be considered as a loss under the policy. Undoubtedly a mere meditated change does not affect a policy. But circumstances are to be taken as evidence of a determination, and what better evidence can we have, than that those who were authorised had determined to change the

voyage. In my opinion the voyage was abandoned; and I have the highest authority in Westminster Hall to confirm that opinion. Suppose they had gone upon the second voyage, and the ship had been lost after insurance for that voyage, on which of the two policies could they have claimed and recovered? Certainly not on the first. Upon the letters of the agents and the captain, it must clearly be considered an abandonment.

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The Lords found, that the voyage ought to be considered as having been abandoned before the loss of the vessel,—and the interlocutors were reversed. 7th July, 1819

*** Upon the question, when a risk commences under the word "*at*," the case of *Lambert v. Liddiard*, 5 Taunt. 480, makes the nearest approach to the case reported. In *Lambert v. Liddiard*, it was held that the risk had commenced upon the ground that the ship had *prepared for the voyage*, by inquiring for a cargo. Where the contract is, that the beginning of the adventure shall be "*immediately from and after the arrival of the ship at*," &c.; or "*from the departure*," the difficulty is removed. In the common case where it is "*at and from*," &c. without any special words to restrict the meaning of the word "*at*," the beginning to load the cargo, or preparing for the voyage, seem to be the principal circumstances to determine the commencement of the risk. In the case above reported, it may be material to note, that a very small proportion of the cargo brought into the port of Cadiz had been discharged when the ship was lost; and that the owners had received from the underwriters on that cargo the amount of their loss, upon the ground that the risk was not at an end when the loss happened. Upon the question of abandonment, the case of *Driscoll v. Bovill*, 1 Bos. & Pul. 313, is the nearest to (but far short of) the case reported. For in that case the captain had written a letter, asking advice of the broker; but he had reserved his determination, and afterwards sailed upon a voyage which, in the opinion of the Court, was within the terms of the original policy.

ENGLAND.

APPEAL FROM THE HIGH COURT OF CHANCERY.

JACKSON *Appellant.*INNES and others *Respondents.*

WHERE lands are in settlement, and the husband and wife join in a mortgage of them; if the deed creating the security is no more in effect than a simple charge upon the lands, and does not alter the limitations further than is necessary to create the charge, the right of redemption, although it be reserved by the deed to the husband and wife, or either of them, *their or either of their heirs*, &c. belongs only to those who are intitled under the settlement, and not to the heirs of the husband, if he survive the wife.

But where the lands of A. upon her marriage were settled to the use of husband and wife successively for life, remainder in strict settlement, remainder to the wife and her heirs, with a power of revocation and appointment of new uses; and she joined with her husband in a mortgage, and by the deed to lead the uses of a fine which the husband and wife afterwards levied, according to covenant, the lands after the determination of the term, created to secure the repayment of the money borrowed, were limited to the husband and wife, and survivor for life, remainder in tail special; remainder, for default of such issue, to the right heirs of the survivor of husband and wife: The wife having died without issue, leaving the husband survivor, it was held, that this was more than a mere mortgage transaction—that there was evidence of an intention to effect a change of the beneficial interest; and that there was upon the face of the deed a clear manifestation of such intention, equivalent to a declaration; and consequently that the husband and his heirs, and not the heirs of the wife, were intitled to the equity of redemption.

Lord Redesdale.—The facts * material to be stated in this case are as follows:—By a marriage settlement, executed in the year 1743, certain lands were settled to the use of Richard Jackson, the husband, for life; the remainder to Anne, his intended wife, for life; remainder to the children, male and female, of the marriage, in strict settlement; remainder to the use of Anne, the intended wife, her heirs and assigns; and the deed contained a proviso, enabling R. Jackson, and Anne, his intended wife, by any deed, &c. to revoke the uses, and to limit or appoint any other uses to any persons, and for any estates. In the year 1745, the husband and wife borrowed the sum of 200*l.*; to secure the re-payment of which, by indenture, dated the 25th of November, 1745, they demised the said lands to John Child, (as mortgagee) for the term of one thousand years, with a proviso for redemption, by *R. Jackson and Anne his wife, or either of them, their, or either of their heirs, &c.* and in case of such redemption, that the term and estate thereby granted should determine. This latter instrument, it is to be observed, could only have effect under the power of revocation contained in the settlement, and it oper-

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* The facts, as they appeared upon the pleadings in the Court of Chancery, at the original hearing, are to be found stated at length in Mr. Vesey's Reports, vol. xvi. p. 35. Some omissions and some inaccuracies, owing probably to the state of the pleadings at the date of the decree, have been supplied and rectified in the following report. The observations made in moving judgment comprise a sufficient outline of the facts to make the case intelligible to the reader, and to supersede the necessity of giving a distinct and independent narrative of the case.

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ated merely to create a mortgage term, subject to redemption. It is clearly no more than a simple charge upon the estate, redeemable by Jackson, his wife, and their heirs, &c. and it did not alter the limitations of the settlement farther than was necessary to create the charge; it was, therefore, not redeemable by the heirs of the survivor of Jackson and his wife, but only by those who were entitled under the settlement, in the year 1746.

Jackson and his wife having afterwards borrowed of the mortgagee the further sum of 400*l.* by indenture, dated the 1st of January, 1746, they confirmed to the mortgagee, &c. the lands demised for the remainder of the term, discharged from all former provisoes, &c. but subject to a proviso for redemption, upon payment by Jackson and his wife, of the sum of 600*l.* with interest, whereupon the term and the respective indentures, whereby it was granted and confirmed, were respectively to cease and be void; and Jackson and his wife thereby covenanted to levy a fine of the lands, &c. and it was declared that the fine so levied of the premises should enure to the use of the mortgagee, his, &c. for the remainder of the term, subject to the proviso for redemption; and “from and after the expiration, or other
“ sooner determination of the said term, to the use
“ of Richard Jackson and Anne his wife, for their
“ lives, and the life of the survivor, and from the
“ decease of the survivor *to the use of the heirs*
“ *of their two bodies, &c. and for default of such*
“ *issue, to the use of the right heirs of the sur-*

“ *vivor of R. Jackson, and Anne his wife, for ever,*” &c. A fine was afterwards levied according to the covenant, and it is upon the construction and operation of the latter words of this deed that the whole question in this appeal arises.

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Of the same date with the deed by way of further mortgage and limitation, R. Jackson executed a bond and warrant of attorney to C. the mortgagee, to secure the repayment of all the money borrowed. In the year 1755, R. Jackson paid the principal and interest then due to the mortgagee; whereupon the chirograph of the fine, and the deed of 1746, to lead the uses, were given up to him, and satisfaction acknowledged upon the judgment which had been entered up by the mortgagee. But I do not find that any assignment was made to him of the term.*

It is to be observed, that the proviso for redemption, which was contained in the first deed of mortgage, stipulating, that “ if R. Jackson “ and Anne his wife, or either of them, their “ or either of their heirs, &c. should pay, &c.” was by the second deed of mortgage and new limitation discharged; and in this latter instrument the proviso was simply, “ if R. Jackson and “ Anne his wife, should pay, &c. that the said

* In the report of this case, in 16 Vesey, 356, it is stated, that the term was assigned to Jackson, the husband. But that is a mistake. The provision of the deed is, that on payment, &c. the term shall cease; and there is no proviso for re-assignment. According to the substance and prayer of the cross bill, in the cause, it is supposed that the term is in the representative of Child, the mortgagee.

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“ indenture and the former indenture of mortgage, and every article, clause, and thing therein contained, should cease, determine, and be void.” The effect, therefore, of the second deed is to confirm a term of years, which should be redeemable and cease on re-payment of the money borrowed, &c. and after such determination of the term, the lands are settled to specified uses.

Mrs. Jackson died in the year 1772, without issue, having made a will, which has no operation upon any matter in question in this case : because her power of disposal by will did not extend to any part of the property in question.

Post, p. 109.

The fine and the indenture of 1746, which had been delivered up to the husband, were mislaid, and supposed by him to have been lost, but they were found after the mortgage transaction between him and Charles Cooth, the heir of Mrs. Jackson.

In the argument of this case much stress was laid upon the expressions of the letter, written by Richard, (then Dr.) Jackson, to Cooth, dated the 8th of July, 1772, thirty-six years after the date of the deed creating the new limitations. In that letter, after mentioning a will, supposed to have been left by his wife, he adds, “ It would not hurt me in the least to find it good for nothing. As you are HER HEIR AT LAW. Should I find the fee of her estate in me, I might,” &c. When he wrote that letter, he seems to have had an impression of some deed by which the fee vested in him. From this it has been argued, that the relief has been rightly given by a Court of Equity,

upon the supposition that the deed of 1746 was a fraudulent transaction. But it appears clearly, from the frame of the decree* itself, that it was not made upon that ground; and from an investigation of the whole transaction, no facts can be collected to justify the imputation of fraud. To forget the particular terms of a marriage settlement, executed at a very distant period of time, is no uncommon failure of the memory; and from the letter, dated the 7th of August, 1772, in which Dr. Jackson inclosed a copy of his wife's will, and where he uses, respecting the freehold estate, the expression, "It is mine for life, as heir to my children;" it is clear that he had forgotten the terms of the settlement, and was writing under evident mistake.

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At various times after the date of these letters, Dr. Jackson, upon the application of Charles Cooth, had lent him sums of money, which in the year 1783 amounted to 600*l.*; and Dr. Jackson by a letter sent to Cooth but a short time before, having informed him that the chirograph of the fine and the deed to lead the uses were missing, and that he (Charles Cooth), as heir-at-law to Mrs. Jackson, was intitled to the estate after his (Dr. Jackson's) death; it was agreed between them that the 600*l.* advanced should be secured by a mortgage to be made by Cooth of his supposed reversionary interest. Upon this misapprehension of Dr. Jackson as to the

* Lord Redesdale, in moving judgment, read the whole decree. See p. 112, et seq.

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nature of his interest under the new settlement, it is to be observed (in addition to the length of time since the execution), that the ultimate limitation was not simply and absolutely to Dr. Jackson in fee. But after estates provided to him and his wife for their lives, and for their issue, upon the decease of the survivor; the fee in default of issue was limited to the survivor of the husband and wife. Under this misapprehension, however, a mortgage of the supposed reversion was prepared and executed in 1784, and by the decree upon the hearing in the Court below, it was declared that the Appellant, as representative of Dr. Jackson, was intitled to a charge upon the estate to that amount.

After all these transactions, Dr. Jackson having made farther advances to Cooth by way of loan, to the amount of 400*l.* the parties agreed that a farther charge should be made upon the supposed reversion by way of indorsement upon the mortgage deed already executed, which was accordingly prepared. But before it was carried into effect, the chirograph of the fine and the deed to lead the uses of the fine, dated in 1746, had been discovered by Dr. Jackson, who thereupon sent to Charles Cooth the deed, purporting to create a mortgage upon his supposed reversion as an useless instrument.

Charles Cooth, before he received information of the discovery of the fine and deed, had, by a will dated in 1782, given to one Hester Bower, his supposed reversionary interest in the Lye Farm, (part of the lands in question). The will adopting

the erroneous notion communicated to Cooth by Dr. Jackson himself, recites that “ Dr. Jackson “ is intitled to the premises *for life, as tenant by “ the curtesy of England.*”

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After the death of Charles Cooth, Dr. Jackson sued for and obtained from Mrs. Bower, part of the money advanced to Cooth; and Mrs. Bower died in 1794, without having made any claim to the reversion under the will of Charles Cooth, and without requiring any receipt for the monies paid by her to be indorsed upon the mortgage of the supposed reversion.

In 1797 Dr. Jackson died. He had made a will in 1775, when Charles Cooth was living, by which he had given the lands and farms in question to Charles Cooth and the Appellant. Afterwards, by a will dated in 1797, he devised the same lands, &c. to the Appellant, subject to the charge of certain annuities.

The Bill was filed in 1804 by J. B. Innes, claiming as heir at law to Hester Bower. It was afterwards amended by making Edmund, the heir at law of Charles Cooth a co-plaintiff, and adding other parties. After stating the original settlement, the several deeds of mortgage, and new limitation, &c. and that the equity of redemption was by mistake reserved to the survivor of Dr. Jackson and his wife; the bill prayed an account of arrears of the mortgage, of rents and profits, since the death of Dr. Jackson, &c. and a reconveyance, &c. The cross bill filed by the Appellant seems to have had no reasonable object or purpose, and was properly dismissed. The

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causes having been heard in 1809, before the Lord Chancellor, it was declared, in the original cause, that (the Appellant) was a trustee of the equity of redemption in the estates and premises called Lye Farm, for the said Plaintiff J. B. Innes, as the heir at law of Hester Bower, who was the devisee of Charles Cooth, the eldest son and heir at law of John Cooth, deceased, who was the heir at law of Anne Jackson; and of the equity of redemption in the estate and premises called Burnt House Farm, for the said Edmund Cooth, as the heir at law of the said Charles Cooth. And it was ordered, that the Master should take an account of the rents and profits of the said premises received by (the Appellant); &c. since the death of the said R. Jackson. And in case (the Appellant) had been in possession of all or any part of the said premises, it was ordered, that the said Master should set an annual value, by way of rent, where-with he ought to be charged. And it was ordered, that (the Appellant) should be charged with the same accordingly; and in taking the said account the said Master was to apportion such rents, issues, and profits between the said premises called Lye Farm, and the said premises called Burnt House Farm. And it was ordered, that the said Master should take an account of what was due for principal and interest, upon and by virtue of the indentures of lease and release, or mortgage, bearing date the 15th and 16th days of January, 1784, and also what was due in respect of the sum of 80*l.* 2*s.* and interest advanced by the said Richard Jackson to the said

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Charles Cooth, since the date of the said indentures. And it was further ordered, "That in case what should be found due in respect of such principal, interest, and costs, should exceed what should be so found due for the said rents, issues, and profits, then upon the said John Blundell Innes and Edmund Cooth paying the amount of such excess into the Bank, to the credit of the said cause, within six months after the said Master should have made his report; or in case the said rents and profits should exceed what should be found due for principal, interest and costs, as aforesaid, it was ordered, that Gilbert Jackson (the Appellant,) and Jane Hamilton, should re-convey the said farm, called Lye Farm, with the appurtenances, to the said John Blundell Innes, and the said farm called Burnt House Farm, with the appurtenances, to the said Edmund Cooth, free from incumbrances; but in default of the said John Blundell Innes and Edmund Cooth paying the amount of the excess aforesaid by the time and in the manner therein mentioned, it was ordered, that the Plaintiff's bill in the original cause should stand dismissed; but his Lordship reserved the consideration of the question, who was beneficially entitled to what should be found due for principal, interest, and costs, until after the Master should have made his report." From this decree the appeal is presented upon the ground that the decision is not justified by the authority of the cases in which reservations of the equity of redemption to persons

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having no previous interest, have been considered as resulting trusts for the previous owners of the estates.

This is a case of great importance as a precedent, and as affecting the titles of persons who take under conveyances, supposing it not to be liable to impeachment upon the ground stated. It is highly important in all cases, that the principles of decision should be known and uniform—that professional persons may be able to advise with safety. In a case of this kind, a purchaser acting under a misconception of his legal adviser, found that his title was deficient. That was the case of *Ruscombe v. Hare*, in which the doctrine of resulting trust was held applicable. In this case it is alleged, that there is a distinct ground, *scil.* of fraud, to annul the limitation to the husband being the survivor. But no such ground is recognised by the decree, or established in evidence. The only question, therefore, which is now presented for the consideration of the House is, whether the decree is founded upon the principle which regulated former decisions, and was established by the judgment of this House upon the appeal in the case of *Ruscombe v. Hare*. The principle is this—That in a mortgage, the mere form of reservation of the equity of redemption is not of itself sufficient to alter the previous title. In such a case, (where fraud is out of the question), it is supposed to arise from inaccuracy or mistake, which is to be explained and corrected by the state of the title as it was before the mortgage. This is conformable to the principle upon

5 Dow, 1.
 (11. P. June 5,
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which other cases have been determined. If a lease be made by tenant for life, under a power created by a settlement, and a rent is reserved to the lessor and his heirs, (which is not an unusual blunder), those words are interpreted by the prior title, and applied to such person as, under the settlement, may be entitled to the estate in remainder, and not to the heir of the lessor, unless he happen to be such remainder man. In all such cases, the words used are to be interpreted according to the title when the instrument is executed. So where an estate belonging to the wife is mortgaged, and the equity of redemption is reserved to the heirs of the husband, there is a resulting trust for the wife and her heirs.

The case of *Broad v. Broad* * was the first in which the doctrine was applied. In Eq. Ca. Abr. 62, it is laid down as a general principle, that where money is borrowed by husband and wife, upon the security of the wife's estate, although the equity of redemption by the mortgage deed is reserved to the husband and his heirs; yet the wife shall redeem, and not the heir of the husband; and for authority, reference is made to the case of *Broad v. Broad*. According to the facts of that case, to be collected from the reports, T. B. the husband of the Plaintiff in the suit, settled certain houses in Bread-street, London, to the use of himself for life, remainder to the Plain-

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* This case appears in Eq. Ca. Abr. 316, referring to 1 Vern. 219, under the name of *Brend v. Brend*. In 2 Chanc. Ca. 99, it is Brond v. Brond; and in 2 Chanc. Ca. 161, it is Broad v. Broad. See *post*. p. 117, note.

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tiff for life for her jointure. These houses were burnt down in the great fire in 1666. In order to rebuild them, the husband borrowed 600*l.*, and a fine was levied by husband and wife to the lender for 99 years, who re-demised the premises to the husband for 98 years, rendering 36*l.* per annum, and binding himself to repay the 600*l.* at a time, * &c. The husband had agreed with the wife that she should have the redemption paying the interest of the money borrowed. But when the houses were rebuilt, the husband settled them, among other lands, upon himself, in tail to the heirs male of his body—the remainder in tail to his brother, (who was Defendant in the suit) charged with portions of 3000*l.* to his daughters. He died, making his brother, the Defendant, his executor; and his personal estate was not sufficient to pay his debts. The Defendant had executed a bond, upon which he was liable as surety for his deceased brother to the amount of 1600*l.* which he satisfied, and also paid the interest of the 600*l.* borrowed, until 1681, when the Plaintiff filed her bill, by which she prayed that she might redeem, paying proportionably, and hold over until she was repaid with interest. The Defendant insisted that the premises, having been re-demised to his brother, were assets to pay his debts; and further, that the Plaintiff's title was but a parol agreement between husband and wife; and that he had no notice of the agreement until the filing of the bill.

* It was in such form that mortgages of this species were made at the date of the report.

It was decreed, that the Plaintiff should have the redemption, paying a third part of the principal, but should have no profits received by the Defendant until the filing of the bill in 1681, when he first had notice of the agreement. The decree, therefore, which was made upon the original hearing, proceeded entirely upon the foundation of the agreement. A bill of review * having been afterwards filed, suggesting, that the decree was founded upon a trust arising out of an agreement by the husband, and that the agreement was not mentioned in the decree, nor stated to have been proved: Lord North, then Keeper, admitted the objection to the form of the decree, and said, that he took no notice of the agreement on that account, but affirmed the decree, because when the wife joined in the fine of her jointure, in order to a mortgage or security, it was not an absolute departing with her interest; but there resulted a trust for her when the mortgage was paid, to have her estate again, as if it had been a mortgage on condition, and the money paid at the day.

That was the first † case in which the principle was established. It has ever since been adopted

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* 22 Feb. 1683, *Broad v. Broad*, 2 Chanc. Ca. 161. It appears singular that the Court in this case, at the original hearing, should have proceeded upon the ground of the agreement only, and have taken no notice of the doctrine of resulting trust. Because in the same Court three years before, a case seems to have been decided upon that principle. See the note, *infra*.

† There is an earlier case, decided in the time of Lord Nottingham, in which the same principle appears to have been applied. *Cotton v. Cotton*, 2 Chanc. Rep. p. 72. 30 Car. 2. The

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and referred to in all subsequent cases, up to the late decision in *Ruscombe v. Hare*. The rule fixed by those cases is no more than this,—where the equity of redemption is reserved to the husband, upon a mortgage of the wife's estate, and there is nothing more in the transaction, the Courts hold, that no alteration of the previous rights of the parties is effected. But it is an exception to that rule, where other circumstances occur, affording evidence of an intended alteration of rights.

In *Rowel v. Whalley*, 1 Chanc. Rep. 116, the wife joined with her husband in a mortgage of her lands, by a deed containing a proviso and declaration, that if the husband and wife, or either of them, or their heirs, executors, &c. paid to the mortgagee, his executors, &c. the sum borrowed, that the fine to be levied according to a covenant contained in the deed should enure to the husband and wife, and the longest liver of them; with remainder to the right heirs of the husband for ever. Here is a case of a distinct declaration, in no manner depending upon the

cause was heard by Mr. Justice Windham, and the application of the doctrine of resulting trust appears incidentally in the report of the decree, which contains the following declaration:—"And as to the mortgage made to Perkins by the said Nicholas and the Defendant his relict, it appearing that part of the mortgaged lands was, before that mortgage was made,* settled on the said Nicholas and Katherine in jointure, or otherwise, so as the same came to her as survivor: This Court is of opinion, that the equity of redemption belongs to her as survivor, and not to the Plaintiff," who claimed it as heir to Nicholas her husband.

proviso for redemption, but defining the course in which the property is to be carried after the satisfaction of the mortgage. A fine was afterwards levied, according to the agreement among the parties, and after the death of the husband, a bill to redeem was filed by the relict. The son and heir of the former husband being a party Defendant in the suit, was an infant. The Court decreed, that the Plaintiff and the infant, should proportionably pay what was due upon the mortgage, at the time of the death of the mortgagor, rating the estate for life of the Plaintiff in the premises at one third, and the reversion in fee of the infant at two thirds. In that case it was determined that the subsequent declaration and limitation having no connexion with the proviso for redemption, but declaring what should become of the property after the mortgage was satisfied, operated against the construction of a resulting trust for the benefit of the wife. It was held to be a distinct settlement, and that she had parted with her estate. In the case now pending before us for judgment, the distinction is stronger; for it is the mortgage term which is made redeemable by the husband and wife, and the fee is the subject of settlement.

In the case of the *Earl of Huntingdon v. the Countess of Huntingdon*, * 2 Vernon, 437, the

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* See *Tate v. Austin*, 1 P. W. 264, where this case appears as cited by Cowper, Lord Chancellor; but the circumstances are not correctly given in the report.—The Lord Chancellor is supposed to state in *Huntingdon v. Huntingdon*, that the heir

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mortgage was made by the mother of the Plaintiff joining with her husband, of lands, being her inheritance; and the purpose was to raise money for the husband to pay for the place of captain of the Band of Pensioners. The mortgage was for a term of years, subject to which the estate was settled to the Countess, (the Plaintiff's mother), for life, remainder to the Plaintiff in tail; the proviso for redemption was, that on payment of the mortgage money, the term should cease. In 1683, the Countess joined with her husband in an assignment of the mortgage; and in the deed of assignment the proviso was, that on payment of the money borrowed by them, or either of them, the mortgage term was to be assigned as they, or either of them, should direct or appoint. The husband afterwards paid off the mortgage, and took an assignment of the term in trust for himself, and by will bequeathed his personal estate to the Defendant, his second wife, who claimed the term. The Plaintiff filed a bill in Chancery, praying that the term might be

of the wife brought his bill to exonerate the inheritance, and to have the mortgage paid off out of the husband's personal estate; which is repugnant to the facts of the case, and the previous statement in the report itself, that the husband had, in his lifetime, paid off the mortgage. The question in the cause was, Whether the executrix and devisee of the husband, (being his second wife), was entitled to hold the term under the will, for her own benefit; or whether there was a resulting trust for the heir of the first wife; and if so, whether he was bound to repay to the estate of the deceased husband the principal and interest, which he had paid to discharge the mortgage, or was entitled to have an assignment of the term without such payment.

assigned to^d him. The Lord Keeper refused to make such decree, except upon the usual terms of a redemption, paying principal, interest, and costs; but upon appeal* to Parliament the decree was reversed, and the term directed to be assigned to the Appellant, with an account of profits from the death of the Appellant's mother, making to the Respondent just allowances for the maintenance of the Appellant, and management of the estate. In that case, the limitation, after the life-estate, was to the son in tail; and in the case now under discussion, it is to the husband and wife, and the heirs of their bodies; or, in default of issue, to the survivor of the husband and wife in fee; and that is the only difference in that respect between the cases. The proviso for redemption in the Earl of Huntingdon's case was, that on payment by either of them, the term should be assigned as they or either of them should direct. Under these circumstances, the executrix and devisee of the husband insisted that, as he had paid the mortgage, and taken the assignment, it belonged to her as his representative. The son of the former wife contended, that the estate was under settlement, and bound by the terms of the settlement; that the husband and wife could not deal with the estate beyond their own interest; and it was held, as to the term assigned to the husband, and possessed under his will by the Defendant, that there was a resulting trust for the son.

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* 1 Bro. P. C. 1.—Journ. H. of Lords, 17 vol. p. 236.

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In the case of *Lewis v. Nangle*,* the property which belonged to the wife was mortgaged and settled upon the husband and wife, with remainder, not to the wife herself, but to the wife's sister: the wife died, and the sister brought a bill in order to compel the husband to pay off the mortgage. In that case it appeared, that the money raised upon the mortgage being 1100*l.* was in part borrowed for the use of the husband, and part of it for the purpose of paying a debt incurred by the wife previous to the marriage. In giving judgment upon that case, the Lord Chancellor said, "The general rule is, that when
 " the husband borrows a sum of money for his
 " own use, and the wife joins in a mortgage of
 " her jointure, for re-payment of it, that her estate
 " shall be a creditor upon the husband for that
 " sum. So it is where there is no settlement, and
 " the wife mortgages her estate of inheritance, to
 " raise money for the husband, but where, at the
 " time of executing such mortgage, or security,
 " a settlement is made, either before or after
 " marriage, there is no instance in which the
 " husband has been considered answerable to the
 " wife's estate for the money borrowed,"—and he there held, that under the circumstances of this case, there being a settlement of the estate, the husband was not liable for the money borrowed. The subsequent limitation was not impeached by the person who brought the bill, because that person was entitled to the estate under that limitation.

* Ambler's Rep. p. 150.

In the case of *Jackson v. Parker*,* which was decided by Sir Thomas Sewell, a difficulty occurred of a different description. The husband had borrowed a sum of money, and in order to make a security, by mortgage of his own estate, his wife joined in a fine, which would have the effect of barring her of any claim of dower. The limitation of the equity of redemption was to the husband and the wife, and their heirs; and there was a declaration in the deed, that after payment of the money lent on the mortgage, the fine should enure to the husband and his heirs. Other charges were afterwards made upon the estate, and those subsequent charges were all made redeemable by the husband and wife, and their heirs. The husband by his will made a disposition of this property, in trust, to raise provisions for all his children. But the will was disputed by the eldest son and heir at law, upon the ground, that it was a devise of the equity of redemption, of which the husband was not sole seised; because the equity of redemption was reserved to the husband and wife, and their heirs. Sir Thomas Sewell had some difficulty upon the subject at first, in consequence of the words of the statute of wills, which does not admit of a devise of property, of which the deviser is not sole seised. But upon reflection, he decided, that the case was to be considered as in equity; it was not a legal estate, and as an estate to be governed by the rules of equity, it was the seisin of the husband, and not

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* Ambler's Rep. p. 687

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of the wife. Upon a contest for redemption, the Court would regard the ownership of the estate, previous to the mortgage, and in that view the husband would be considered as the person entitled to redeem, the wife being entitled to redeem only in respect of her interest, which would have been only a right to dower, if she had survived her husband. In such case she would have been entitled to have had the estate redeemed, for the purpose of letting in her dower, but there her right ended, and that therefore the husband must be taken to be, in equity, sole seised of the estate, as if the mortgage had not been made. In that case it was argued, "That the Court " will put a true construction on the deed, by " taking into consideration the ownership of the " estate, and the purpose for which the deed was " made. That the husband was the owner of the " estate, and the intention of the deed was merely " to make a mortgage, and the wife was made " a party and joined in the fine, for the sake " of the mortgagee."—And this argument was adopted by the judgment.

In the case of *Corbett v. Barker*, according to the report,* the Court do not seem to have had the least notion that there existed a resulting trust, such as the House of Lords held to exist in the case of *Ruscombe v. Hare*, and they dismissed the bill. In that case, it appears probable that Baron Thomson doubted the correctness of the decision; for he says, "That a reservation of the

* 1 Anstr. p. 138.

“ kind now under discussion, in a fine levied,
 “ completely *diverso intuitu*, shall not, without
 “ an express declaration of such intention, carry
 “ the estate in a new channel.” The cause being
 afterwards re-heard, the Court seems to have been of
 opinion, that a trust resulted in favour of the original
 owner of the estate, and determined accordingly.
 The report of the case is so very imperfect in its
 language and statements, that it is difficult to
 discover what are the facts of the case, and the
 point decided ; but as far as they can be collected,
 the case appears to have been of the same nature *

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* The case upon the original hearing is reported 1 Anstr. 138. The only facts reported, so far as they regard the principle discussed in the text, are as follow :—The Plaintiff's father being seised in right of his wife, he and the wife mortgaged the estate for a term of years, and a fine was levied according to previous agreement and covenant; which fine was to enure to the use of the mortgagee, his heirs and assigns, subject to the proviso, and the equity of redemption was reserved to the husband and wife and their heirs. Afterwards, the mortgage having been assigned to the Defendants; the husband and wife, in consideration of 160l., by lease and release, conveyed their equity of redemption in fee, and covenanted, that all fines, conveyances, &c. should enure to the sole use of the Defendant in fee. After the death of the husband and wife, the Plaintiff their son filed the bill, claiming the estate by descent, as heir to his mother, subject to the mortgage. For the Plaintiff it was argued, that the mortgage deed being only for a term of years, though the fine is in fee, yet it is to the uses mentioned in the deed; and there is a proviso that on payment, &c. the term shall be void; then only the term was in the mortgage, and the fee was a resulting use in the wife, from whom it proceeded; and that being vested by the statute, she was immediately in of her old estate as to the fee.

Romilly for the Defendant, argued, that the bill could only reach one half of the estate. For as the fine saves the equity

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as *Broad v. Broad*, and the other cases which have been decided upon a similar principle.

It must now be admitted as an established principle, to be applied in deciding upon the effect of mortgages of this description, whether it be the estate of the wife, or the estate of the husband, if the wife joins in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure or dower, out of the estate, and there is a mere reservation in the proviso for redemption of the mortgage, which would carry the estate from the person who was owner at the time of executing the mortgage, or where

of redemption to the husband and wife, and their heirs, one half was therefore vested in him, and passed to the Defendant: but Thomson, B. interposed, saying, "it had often been ruled, that a reservation of this kind, in a fine, levied completely *diverso intuitu*, shall not, without an express declaration of such intention, carry the estate in a new channel; nor even if it had been to the husband and his heirs only." After this interposition by the Court, the argument upon this point of the case appears to have been dropped, and the question was then argued and decided upon the fact of length of possession by the mortgagee. Eyre, Chief Baron, at the conclusion of his judgment saying,—As the Plaintiff fails upon this point, (*i. e.* possession by the mortgagee), it is unnecessary to consider the other, as to the operation of the fine upon the subsequent conveyance; although upon that point the Plaintiff's counsel seemed to be in the right. There is not to be found, either in this report, or in the further report of the case upon the re-hearing, (3 Anstr. p. 755), any other statement or allusion to the doctrine of resulting trust. The principle of decision is to be collected only from the extracts above inserted. It appears singular that it should not have been adverted to by the Court in giving judgment; yet it is possible, considering the decisive remark made by Thomson, Baron, upon the original hearing, that nothing further might have been said upon the subject at the re-hearing.

the words admit of any ambiguity; that there is a resulting trust for the benefit of the wife, or for the benefit of the husband, according to the circumstances of the case. But here, it seems to me, that the operation of the deed, as to the mortgage term, and the operation of the deed as to the limitation of the fee, are wholly distinct, and do not in any way depend on each other. The question does not arise upon the interpretation of the proviso for redemption, but it arises upon a distinct and subsequent clause of the deed. The term and the fee are kept distinct in the deed. The term is a security for the re-payment of the money lent, and when the mortgage should be discharged, the intention of the maker of the deed was, that the term should be completely at an end. The way in which they proposed to effect this was, by declaring, that upon payment of the money due, the term shall cease. If the money had been paid at the day, the term ceasing, there would have remained nothing of the mortgage operating upon the property. But there would then have remained the declaration in the deed, directing what should be done with the estate, subject to the term. The term being at an end, the operation of the deed, so far as it declared the limitations of the estate, subject to the term, remained perfectly distinct, and had no connexion whatsoever with the existence of a term, which then would have ceased to exist. A Court of Equity will so deal with a declaration, that, upon payment of a sum of money on a given day, the term shall cease; that, although the term becomes ab-

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solute by non-payment of the money at the day, it is still subject to redemption. By whom it may be redeemed, must be discovered from the title, which, by the deed itself, is declared to be in the husband and wife, for their respective lives, then to the heirs of their bodies, and then to the survivor in fee. Upon the declarations, therefore, and the provisions of that deed, the redemption would arise by implication, in case the money was not paid at the day. The implication must be drawn from the deed itself, declaring who were the persons entitled to the estate.

In all the other cases decided upon the general principle, the grounds of the decision were, "that the mode in which the redemption was limited, was by mistake or improper contrivance introduced into the deed." But in this case, there is no ground to raise such imputations. For the deed is clear and express in its declarations and provisions. The case is really in principle, if not in circumstances, the same as the case of *Rowell v. Whalley*.

Where the declaration of the uses of the fine refers simply to the operation of the deed as a mortgage: where it is simply a declaration, that the money being paid, the fine shall enure to the persons who make the mortgage, and there is nothing else which makes it subject to redemption, that would be considered as a mere clause of redemption, and construed in the same way. But where the form of the equity of redemption has nothing to do with the limitation of the estate; where the limitation of the estate is per-

fectly distinct, it seems to me the rules which have been established in the cases of resulting trusts, do not in any degree apply.

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Suppose that Dr. Jackson had died first, and that Mrs. Jackson had married again, and marrying again, had issue by a second marriage, there being also issue of the first,—what would have been the construction then put upon this deed? According to the deed, if she had only daughters by the first marriage, they would take the estate under the limitation to the heirs of the body of Dr. and Mrs. Jackson. But if the estate was to be considered as a fee in her, and if this subsequent declaration was to operate nothing, if she had a son by her second marriage, that son would be her heir at law. Yet if a contest had arisen between the daughters by the first marriage, and the son by the second, could any doubt have been entertained who would be entitled to the estate? Dr. Jackson had stipulated for his own children. Consider how the estate was limited before the mortgage. It was limited by the original settlement to the children. When that settlement was destroyed by the fine, and the revocation, which was the effect of the fine, and new uses declared, the resulting trust, if any could arise, must be to the old uses declared under the settlement. If otherwise, the estate must have gone according to the new uses; and then there might have been a contest between the persons entitled under the latter disposition, and those who were entitled under the former.

Suppose again, that Mrs. Jackson had survived,

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and there had been issue of the marriage, and the issue had thought fit to say to Mrs. Jackson, "you " are only tenant for life," would not she have had a right to answer, "I am tenant in tail under this " deed; I and my husband have levied a fine; " and having levied a fine, declared the estate to " ourselves and the heirs of our own bodies, which " gives me an estate tail, and enables me to dis- " pose of the estate in case I should think fit to " suffer a recovery or to bar the entail by a fine." It would have been extremely difficult in such a case to have decided that Mrs. Jackson was not entitled to the benefit of this estate.

The question of fraud must be put out of the case, as it appears to me. How can it be imagined that a prospective fraud was contemplated, the effect of which, according to the view in which the objection is made, must have depended upon the chance, whether the husband would survive the wife. That contingency happened six-and-twenty years after the deed was executed. The Court must interpret the deed. No Court has a power, in such a case, to set aside a deed. *Ruscombe v. Hare*, and all the prior cases, have been interpretations of the deed. The ownership, prior to the deed, and the purpose of the deed, must be considered, in giving the interpretation;—that is the language of Sir Thomas Sewell in *Jackson v. Parker*. In the case before us, we are required not to interpret the deed, but to determine that the part of the deed which, having no connection with the mortgage, disposes of the estate, subject to the mortgage term, is to be wholly set aside,

either as a fraud, if a case of fraud can be made out, or as a mistake, if a case of mistake can be made out. If they proceed on the ground of mistake, there must be evidence. To support the allegation of fraud there must also be evidence. It must be shewn that this clear and explicit declaration was contrary to the intention of the wife, in consenting to the deed. If the wife had survived, and she had thought fit to insist upon the validity of this deed against her own children, could it then have been said that it was a fraud upon her intention in executing the deed; and yet, to support such a claim on behalf of the children, it would have been necessary to decide that a fraud was practised upon the wife, and that the deed was made contrary to her intention. Nothing short of that opinion would enable the Court to restore the original settlement, and give the children a claim, in contradiction to the rights of the mother, under this deed.

If the question had been put to me, after the death of Mrs. Jackson, whether Dr. Jackson, having survived her, had a good title to this estate, I should not have scrupled to give my opinion, that he had a good title to the estate. If a similar question had been put to me in *Ruscombe v. Hare*, I should have answered doubtfully; because, in the case of *Broad v. Broad*, and cases decided upon the principle which there prevailed, I should have found that Courts of Equity had applied the doctrine of resulting trust for the benefit of the wife. But, according to the mode in which

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this settlement has been made, there is no connection whatever, in legal operation, between the mortgage and the new limitations contained in the deed, which are distinct in form and substance, expressly providing for a subject which was not included in the mortgage. They limit the reversion in fee, while the mortgage is confined to the term of 1000 years.

Upon these grounds it appears to me that the part of this decree which declared, that the Appellant was a trustee of the equity of redemption for Blundell Innes, as the heir of Hester Bower, and for the heir of Cooth, is not according to law. The equity of redemption there intended is, I presume, the equity of redemption upon the original mortgage, which was made by Dr. Jackson and his wife, because the Appellant was not trustee of any equity of redemption upon the mortgage of 1784. Dr. Jackson was mortgagee in that mortgage. The mortgage of 1784 was a mortgage made by Charles Cooth to the late Dr. Jackson. It was a conveyance, under the supposition that Charles Cooth had a legal interest in the reversion of the estate. The supposed equity of redemption was in Charles Cooth, and in those claiming under him, and it was the supposed legal estate that was so far in Dr. Jackson. I apprehend therefore that the declaration that the Appellant was trustee of the equity of redemption, means the equity of redemption upon the mortgage term, which was created and confirmed by the mortgage deeds executed in 1745 and 1746, by Dr. and Mrs. Jackson. If that term of years was vested in Dr.

Jackson, it was a term which, according to the spirit of the decree, he or his representative would have been bound to convey. But what is vested in the present Appellant, Mr. Jackson, under the will of the late Dr. Jackson, is not an equity of redemption, but a fee simple of the estate, subject to a term of years, which term of years was subject to an equity of redemption.

I apprehend that at the time when this decree was made, the circumstances of the case could not have been correctly stated to the Court; that there must have been some confusion, arising from the statement which was made to the Court, and owing to that confusion this declaration was contained in the original decree—that the Appellant was a trustee of the equity of redemption in the estates and premises, the Appellant not having in him any estate whatsoever which was in the nature of an equity of redemption. He had the fee simple of the estate, subject to a term of years;—but he had not in him, so far as I can find from the pleadings, the term of years, for I do not find that the term was assigned. He had also whatever interest Cooth conveyed by the mortgage which he executed; but that mortgage executed by Cooth could convey nothing, if Jackson had the fee in him which was vested by the settlement made in 1746. The language, therefore, of the decree is certainly in that respect incorrect, and I think that must have arisen from some misstatement with respect to the circumstances of the case. As they now appear before the House upon the pleadings, my humble opinion is, that this decree,

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so far as it directs a conveyance by Mr. Jackson to Innes and Edmund Cooth, is erroneous. For the uses limited by the deed of 1746 being to Dr. and Mrs. Jackson, and the survivor of them, and to the heirs of their bodies, with remainder to the survivor in fee, according to the terms of that deed, and as I conceive the intent of the parties, there is no foundation whatever for holding that the settlement made by that deed shall not have the operation which the words of the deed import. I do not find any thing in this case to constitute Dr. and Mrs. Jackson, to whom the estate is limited during their lives, and the natural life of the longest liver, or to constitute the heirs of their two bodies, to whom it was further limited, subject to their estates for life as tenants in tail, or the right heir of the survivor, trustees, or a trustee for any person. But if they were to be deemed trustees, then they must be deemed trustees for the benefit of the persons who would have been entitled under the original settlement. For if the case is to be considered as if the new limitations ought not to have been in the deed, that they ought to be totally expunged from the deed, and that after the declaration that the fine should enure for the purpose of supporting the term of a thousand years, the deed should have no further operation, which is the manner in which a decree of this description, founded on the cases which have been determined, must be framed, if it be maintainable, the consequence would be, that it must result to the trust in the original marriage settlement. In such case, if Mrs. Jackson

had survived, and there had been issue of the marriage, she would have had, under this deed, an interest different from that which she would have had under the marriage settlement, and she would then have been reduced to the simple condition of tenant for life, and her issue would have been entitled, the sons in tail male, and the daughters in tail general, and she could have had only an ultimate limitation in fee. If she had survived, and had issue of the marriage, could we have held that she would have taken no benefit under the deed of 1746, but must have been bound by the provisions of the marriage settlement of the year 1743. I confess I cannot find any ground for such a determination, and therefore I cannot find a ground for supporting the decree which has been pronounced.

I shall move simply to reverse this decree, and that the bill should be dismissed.

The Lord Chancellor.—The circumstances of this case are certainly, in point of fact, much better understood than they were, and much greater research has been made into cases, so as to bring before the consideration of the House, the true principle of decision. The Court below did not rightly apprehend the case, as it now appears. The judgment of this House will remove a difficulty, which I know is floating in the minds of many persons. I conceive it to have been the opinion of Lord Thurlow, that in order to dispose of the equity of redemption of the wife in an estate, it was absolutely necessary there should be in the recitals of the instrument,

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some expression that the parties meant it so: that it was not enough to collect the intention from the limitations; but that there must be something more upon the face of the deed to lead the wife to understand what those limitations were. It does however occur to me, on looking into the cases which have been referred to, that such a proposition cannot be supported, and therefore I am of opinion that the decree must be reversed.

10 July, 1819;

Decree reversed.

* * * After I had written the note which is to be found in pp. 125, 6, I was furnished with an extract of the decree upon rehearing in the case of *Corbett v. Barker*. The decree contains only directions for the ordinary accounts upon redemption, without any declaration upon the subject of resulting trust.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

JAMES BUTLER, Esq. (commonly }
 called Lord Dunboyne) } *Appellant.*
 DANIEL MULVIHILL, and others . . *Respondents.*

A LEASE obtained by fraud and circumvention, from a person in a state of intoxication, is void in equity.

A lease for lives of lands in Ireland, renewable for ever, is not absolutely forfeited by extinction of all the lives and neglect to pay the fines for renewal, even after notice from the lessor. Under particular circumstances, (as in the following case,) the right of renewal may still exist and be enforced.

In a case where A. the heir of the lessee, having such right, had entered into an agreement with B. respecting an independent lease of the lands held under the renewable lease by the ancestor of A., which independent lease B. had obtained from the landlord when in a state of intoxication, and by circumvention:—It was held, that the heir of A. and purchasers for valuable consideration, claiming under him, were entitled in equity to the benefit of the agreement between B. and A., and that the heir of the landlord (lessor) was entitled to the benefit of the same agreement, so far as B. took an interest.

THE Respondent, Daniel Mulvihill, filed his bill of complaint in the Court of Chancery in Ireland, against the Appellant, praying that the Appellant might be decreed to grant to the Respondent D. M. a renewal of a certain lease in the bill, stated to bear date the 5th of July 1718, by inserting the life of Walter Molony in the place of Anthony Brady. The bill stated the following case :

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Garret Gough, being in and before the year 1718, seised of the town and lands of Ballyvannon and Tullahara, with their sub-denominations, by indenture, bearing date the 5th day of July, 1718, demised the said premises unto Joseph Ringrose, subject to the yearly rent of thirty pounds; to hold unto the said Joseph Ringrose, his heirs and assigns, for and during the life and lives of the said Joseph Ringrose, Richard Ringrose, and Elias Ringrose, and the survivor of them, and the lease contained a covenant for perpetual renewal, on payment of five pounds, as a renewal fine on the fall of each life, and the nomination of another life.

Joseph Ringrose, by virtue of the lease, entered into, and continued seised and possessed of the premises, until the time of his death, which happened in the year 1758. He left two sons, Jacob Ringrose and Philip Ringrose. Jacob, as eldest son and heir at law, entered into and became seised of the said lands, and continued so seised to the month of July, 1778, when he died without issue, leaving Philip Ringrose his brother and heir at law, who thereupon became entitled to the said lands and premises.

John Brady, nephew of Jacob Ringrose, having alleged that Jacob Ringrose had devised the said lands and premises to him, and all the persons named in the said original lease, as *cestui que vies*, being dead, obtained a renewal thereof in his own name from James Butler, the Appellant's father, in whom the fee of the said lands and premises were then vested, for the lives of him

the said John Brady, Mary his wife, and Anthony Brady his son, by a deed, bearing date the 11th day of July, 1783.

By indenture, bearing date on the 4th of July 1793, John Brady declared that he had taken the said renewal in trust for Philip Ringrose; and by the same indenture, Philip Ringrose demised the said premises to John Brady, for the life and lives of him the said John Brady, Anthony Brady his son, and Mary Brady his wife, at the yearly rent of one hundred and forty-two pounds; by virtue of which demise, John Brady became, and continued seised and possessed of the premises.

By a deed bearing date the 26th day of July, 1793, Philip Ringrose, for the considerations therein mentioned, conveyed and assigned all his estate, right, title, and interest, in and to the premises to Walter Weldon Molony, his heirs and assigns.

By indenture, bearing date the 27th day of December, 1794, Philip Ringrose and Walter Weldon Molony, in consideration of a marriage then intended to be solemnized between Walter Weldon Molony and Mary Spellisy, granted &c. to the respondent Daniel Mulvihill and Walter Weldon since deceased, the towns and lands of Ballyvannon aforesaid, with its subdenominations, subject as therein mentioned, to hold, &c. for three lives, renewable for ever, in trust for the several uses, intents, and purposes in the deed mentioned.

James Butler died in the year 1784, and one of

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the lives named in the renewed lease granted in July, 1783, having dropped, Daniel Mulvihill made several applications to the Appellant, who upon the death of James Butler, his father, became seised of the reversion of the said lands, for a renewal of the said original lease of 5th day of July, 1718, by inserting the life of Walter Molony, in the place of Anthony Brady, named in the renewed lease; and offered to the Appellant the sum of five pounds, with interest from the death of Anthony Brady, and also the proportion of a renewal-fine for the time which had elapsed since the death of the said Anthony Brady.

The Appellant having refused to renew the lease of 5th July, 1718, according to the request, and upon the terms proposed, the bill was filed against him, containing such allegations and prayer as before stated.

The Appellant, by his answer, after admitting many of the principal facts alleged in the bill, proceeded to state, that although, upon the death of Joseph Ringrose in 1758, Jacob Ringrose, his son, became seised under the lease of 1718, and so continued until 1778; yet the said Jacob omitted to renew the said lease, by nominating any other life in place and stead of Joseph Ringrose, and omitted to pay the rent and renewal-fine; and although, in the life-time of the said Jacob, namely, between the said years 1758 and 1778, Richard Ringrose, another of the *cestui que vies*, died, Jacob Ringrose also omitted to renew the said lease, by nominating a life in

the place and stead of the said Richard Ringrose, or by paying the rent and renewal-fines; and although, immediately after the death of the said Jacob in 1778, the said Elias Ringrose, the last life in the said lease, died, yet Philip Ringrose omitted to renew or pay the renewal-fines, rent, or arrears, pursuant to the covenant of renewal contained in the said lease of 1718, and withheld the yearly rent of the said lands reserved thereunder to a large amount, which arrears of rent and renewal-fines remain still unpaid, whereby the said lease of 1718 became forfeited in the life-time of Jacob Ringrose, and all benefit of renewal thereof for ever lost to the Ringrose family, or any other person claiming under the said lease of 1718.

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The answer denied that John Brady, at any time, obtained a renewal of the lease of 1718 in his own name; and stated, that James Butler, who, upon the death of his uncle in or about the year 1778, succeeded as heir at law to the inheritance of the said lands, was a man of weak understanding, and addicted to excess in the use of spirituous liquors, and being educated in a foreign country, and bred up an officer in the German service, was unacquainted with his family affairs; that John Brady, being well aware of the laches and nonpayment of rent and renewal-fines under the lease of 1718, and of the forfeiture of the lease of 1718 thereby incurred, by the most fraudulent means, at a time when James Butler was in a state of intoxication, prevailed upon him to execute an instrument, purporting to be a new lease of the lands comprised

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in the lease of 1718, bearing date on or about the 11th July, 1783, at the yearly rent of thirty pounds sterling, for the lives of the said John Brady, Mary his wife, and Anthony Brady his son, subject to a renewal-fine of five pounds on the fall of each life, with a covenant for perpetual renewal.

That Philip Ringrose, on the 15th day of October, 1789, filed a bill in the Court of Chancery in Ireland, against John Brady, impeaching the will alleged by John Brady to have been made in his favour by Jacob Ringrose, and praying possession of the said lands; to which bill John Brady filed his answer, insisting upon the validity of the said will, and that all the lives named in the said lease of 1718, were extinct, and that the term thereof was expired; and stating that he treated with the Appellant's father in whom the fee of the lands was vested, and who alleged that he was not then bound by the covenant of renewal contained in the lease of 1718; and that for several valuable considerations, he obtained a lease of the lands from the Appellant's father, which was executed in 1783, for three lives, renewable for ever, discharged from any claims on the part of P. Ringrose, or any person claiming in his right. And Brady by his answer, further denied that he accepted the said lease as a trustee for Ringrose.

That after a variety of proceedings in the cause between John Brady and Philip Ringrose, they came to an amicable settlement; and that a certain deed, dated the 3d of July, 1793, was executed between them, by which, after reciting that Garret Gough was seised of the lands, and

that he executed the lease of 1718, to Joseph Ringrose, and reciting the seisin and possession of Joseph until his death, and the seisin and possession of Jacob till his death, and that all the lives were extinct; and that said Brady thereupon took the lease of 11th July, 1783; it was thereby declared, that the lease of 1783, was taken by Brady in trust for Philip Ringrose, in consideration whereof, Philip Ringrose thereby agreed to execute a lease for three lives, renewable for ever to John Brady, at the yearly rent of one hundred and forty-two pounds, and five pounds as a renewal-fine for each life to be renewed; which lease the said Philip Ringrose, on or about the 4th day of July, 1793, executed to Brady pursuant to the terms of the agreement; and that by the aforesaid deed of 3d July, 1793, John Brady covenanted that all rent then due out of the said premises should be paid by Brady, his heirs, &c. and that Brady would also indemnify Philip Ringrose from all debts and incumbrances due by Jacob Ringrose.

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That after the execution of the said deed of compromise of 3d July, 1793, and the said lease of 4th July, 1793, Philip Ringrose, on the 15th of July, 1793, executed a mortgage of his interest in the lands to Walter Weldon Molony, his solicitor, to secure a bill of costs claimed by Molony against Ringrose for a sum of 1512*l*.

That Walter Weldon Molony, about the 25th or 26th of July, 1793, prevailed on Philip Ringrose to convey to him the equity of redemption in the lands in consideration of an annuity of forty-

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five pounds ten shillings, for the life of Philip, in addition to the former consideration of 1512*l*.

That about the 22d of March, 1800, Philip Ringrose caused a bill to be filed in the Court of Chancery against Walter Weldon Molony and others, impeaching the said mortgage and conveyance for fraud, and charging, that the trustees named in Walter Weldon Molony's marriage-settlement or articles of 1794, had full notice of it; and praying that said deed of mortgage and bond executed therewith, and the said deed of conveyance of 25th or 26th days of July, 1793, and the marriage settlement of Walter Weldon Molony of 26th and 27th December, 1794, so far as same affected Philip Ringrose might be decreed fraudulent and cancelled, and praying a re-taxation of Molony's costs.

That Molony and his wife, about the 3d of April, 1801, filed a cross bill against Philip Ringrose, insisting that John Brady obtained the said lease of 11th July, 1783, as a new lease for his own benefit, and discharged from the said old lease or any covenant of renewal therein contained.

That Philip Ringrose, about the 10th November, 1801, filed his answer to the said cross bill, in which he does not deny that forty-five pounds were due for rent and renewal-fines of the said lands in 1766, and that some rent remained unpaid at the death of Elias Ringrose, the survivor of the persons named as *cestui que rics*, in the said original lease of 1718. He admitted that Brady wished to get a new lease to himself of the said

lands discharged from the said old lease of 1718, or any covenant for renewal therein contained, or any claim of Philip, and in consequence thereof said Brady obtained the said lease of 1783.

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That before any decree was made in the said cause, Ringrose acceded to some amicable settlement.

That the Appellant attained the age of twenty-one years in July, 1801, and never since had received any rent for the lands comprised in the lease of 1783.

That in the year 1801, the Appellant brought an ejectment to recover possession of the lands in question, upon the trial of which, John Brady produced and for his defence relied upon, the lease of 1783, and the jury gave a verdict in his favour.

That the very limited circumstances of the Appellant prevented his taking proceedings to set aside the said lease of 11th July, 1783, as having been obtained by fraud and imposition.

That James Butler died about the month of May, 1784, and not shortly after the said deed of release of 1794, as by bill alleged, leaving Appellant, his only son; who thereupon became seised of the said lands.

That Anthony Brady, one of the lives in the lease of 1783, died on the 13th day of April, 1804.

Finally, the Appellant, by his answer, admitted that he refused to execute a renewal to the Respondent, Mulvihill, of the lease of 11th July, 1783, or the lease of 1718, on the grounds before stated.

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The Respondents, on the 25th day of July, 1809, amended their bill, and thereby stated the death of John Brady. To which amended bill the Appellant put in his answer.

The Appellant filed a cross bill against Daniel Mulvihill, Walter Weldon Molony and Mary his wife, and various other persons interested in the lease; and therein stated the fraudulent means by which the said lease had been, in the year 1783, obtained from his father, the said James Butler, and praying that the same might be declared to have been fraudulently obtained, and be given up to be cancelled.

The Respondents by their answers, respectively insisted on the validity of the lease of 1783, and that they were purchasers of the beneficial interest of the same, without notice of any fraud.

The original and cross causes being at issue, the Respondents respectively exhibited the several instruments under which they claimed to be entitled; and examined a person of the name of Dannaher, to prove that the lease of 1783 had been fairly obtained, and that the fines and rent then due had been paid at the time of the execution of the lease.

The Appellant examined witnesses to prove, First, That the lease of 1783 was not a renewal of the lease of 1718: Secondly, That the lease of 1783 was obtained by fraud, practised on his father when he was so intoxicated as to be incapable of transacting business. Thirdly, That the Respondents, Mulvihill, &c. or those under whom they claimed, had at the time when they became,

as they pretended, purchasers of the beneficial interest thereof, notice, that the same had been fraudulently obtained from the Appellant's father, and that the Appellant was an infant, and incapable of doing any act in confirmation of the said lease.*

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The causes came on to be heard in 1811, July 25. when the Lord Chancellor of Ireland declared, that the Respondent, Daniel Mulvihill, was entitled to the benefit of the covenant for renewal, contained in the lease of the 5th of July, 1718, and directed the Appellant to execute a renewal thereof to the Respondent, Daniel Mulvihill, for the lives of the Respondents, Walter Molony and Arthur Molony, pursuant to the true intent and meaning of the covenant. And in case the parties should differ as to the form of such renewal, or as to the premises contained in the said original lease, it was ordered that it should be referred to the master to compare the lease of the 11th of July, 1783, with the said original lease of the 5th of July, 1718, and thereupon to settle and approve of a proper renewal to be executed between the parties pursuant to the said decree.

The Appellant thinking himself aggrieved by the decree, appealed to the House of Lords upon the following grounds:

The said decree assumes, that the lease of 1718 was in such force, as to entitle the Respondents to a renewal of it, by virtue of the

* Upon some of the points, and particularly the intoxication, see the depositions, *post*, p. 150.

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covenant for renewal therein contained; whereas the lease of 1718 had expired in the year 1778; and though the same might, under the Irish Tenantry Act, have been renewed at any time before notice given by the lessor to renew or within a reasonable time afterwards, upon payment of the rent in arrear and renewal fines; yet the lessor was not bound to renew, except upon such terms, and the Appellant's father having given notice, and the same not having been complied with in a reasonable time, he was not afterwards bound to renew, and therefore the court ought not to have decreed a renewal after an interval of upwards of twenty years.

The lease of 1783 does not even purport to be a renewal of the lease of 1718; the several answers of John Brady and Philip Ringrose shew that it was not so intended, and that it includes lands not demised by the said lease of 1718.

The evidence adduced by the Appellant proves, that the lowest rent which was at any time mentioned as the rent to be reserved, was two hundred pounds a year; whereas that actually reserved was thirty pounds a year, and the annual value of the premises very far exceeded even such rent of two hundred pounds a year.

The Appellant's father, at the time when he executed the said lease, was in a condition of mind which did not allow of his duly judging of its contents.

The lease so fraudulently obtained has not been confirmed by any subsequent act, either of the Appellant or his father.

The Respondents who claim as purchasers for a valuable consideration, had notice of the fraud practised in obtaining the lease, and also of the Appellant's intention to impeach the same; and although this objection were founded in fact, it would not follow that the Respondents, as purchasers for valuable consideration, and without notice of a fraud, would be entitled to the assistance of a court of equity to give effect to a fraud practised by a person under whom they claim, more especially to the prejudice of an infant against whose estate such fraud is to be made effective.

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On the part of the Respondent it was insisted, that no fraud appeared on the deed of 1783, and that at this distance of time it would be impossible for the Respondents to enter into any proof respecting it. That the Respondents are purchasers for a valuable consideration, without any notice of fraud, (if any were practised by John Brady.) That Walter Weldon Molony gave a full and fair value for the conveyance of the lands to him; and there is no evidence whatever that Walter Weldon Molony knew any thing improper respecting the execution of the said renewal; that the said renewal, though not technically drawn, yet being made by James Butler, as heir-at-law of Doctor James Butler, of Thurles, to John Brady, as devisee of Jacob Ringrose, and at the rent and fine for renewal in the lease of 1718, must be equitably and substantially considered as a renewal, and not as an original lease.

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In support of the allegations of the bill filed by the Appellant, a passage from the answer of John Brady to the bill of Philip Ringrose was read; and upon the subject of the notice to renew, the value of the lands, the intoxication, the fraud practised, and the notice to the purchasers, the following evidence was adduced.

Michael Donnellan deposed, that, in the beginning of July, 1783, a conversation took place, in deponent's presence, between John Brady and James Butler, touching a lease, or a renewal of a lease; the particulars of which conversation were, as well as deponent now recollects, as follows: " James Butler told John Brady that his lease of " part of the lands which he held was out, for that " the lives were extinct; and that although he " had been served with notice to renew, and pay " the rent and renewal-fines, yet he had neglect- " ed to do so; but James Butler added, that " he would take no advantage of Brady's neglect; " and Brady said, that he could hold the lands " in spite of James Butler, and make them his " own property, for that the statute of limitations " had nearly run against James Butler, but that " if James Butler would grant him a new lease, " he would take the entire lands; and after some " farther discussion, it was determined to post- " pone any agreement until they should go over " the lands in the morning:" and deponent saith, that on the next morning Brady shewed deponent two of the farms on the lands, namely, Ballyvannon and Tullyhara, and sent an old man of his

to shew deponent the other two farms, which lay at some distance, namely, Tenehire and Island Grady; and deponent saw, examined, and valued all the lands: that after dinner on that day the conversation was renewed touching a lease or renewal of the lands; and James Butler alleged that the renewal-fines and arrears, which were due to him, amounted to eight hundred pounds, to which Brady replied that they could not amount to six hundred pounds; but Brady said that the better way would be for James Butler to forgive him all the renewal-fines and arrears, and to make him a lease of all the lands; and Brady said, that he would make it up to James Butler, by giving him a good rent for the lands; and James Butler having asked Brady what rent he would give, Brady said he ought not to give as much rent as another, he being then in possession of the whole, part thereof under James Butler, and part thereof, to wit, Tenehire and Island Grady, as devised to his uncle Ringrose, and he and family being old tenants to James Butler and his ancestors to that part of the lands called Ballyvannon and Tullyhara; that Brady, after some further observation, said, that he *would give James Butler two hundred pounds a year for the entire lands, on getting a lease thereof for three lives, renewable for ever*; and deponent saith he then interfered, and desired said Brady to double his offer, and that he would have the lands for their value, and said that his valuation of the lands was higher, for that he had *valued them to five hundred pounds a year*, but that he would recommend to James Butler

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to make a lease of the lands to John Brady at four hundred pounds, as an old tenant; which offer Brady peremptorily refused; that he then recommended James Butler and Brady to go in the morning into the town of Ennis, and to lay all their papers before Counsellor Gregg, who was a man of honour and ability, and to be advised by him as to their respective rights and powers, to which they agreed.

Saith, That James Butler and deponent, on the day after, went together from John Brady's house at Ballyvannon, into the town of Ennis; and James Butler remained at a low whiskey house in the town; and deponent slept at a friend's house; that in a day or two, afterwards, Brady also came into the town of Ennis, and renewed his treaty for a lease with James Butler; that Counsellor Gregg having been sent for, he enquired for their title deeds and papers, and neither James Butler nor John Brady having brought them, Counsellor Gregg said it would be impossible for him, without seeing such deeds and papers, to determine whether James Butler had a right to make a lease for three lives, or whether John Brady had any right to withhold any part of the lands: and Counsellor Gregg thereupon refused to interfere: and deponent saith that, perceiving John Brady was very pressing upon James Butler, and knowing from the state of intoxication in which James Butler was constantly, that he would be easily led to make a foolish bargain, deponent sent to Mrs. Butler, &c. &c.: and deponent saith, that on the following day,

deponent was in the bed room with James Butler, when John Brady, and a clerk of the name of Michael Dannaher came into the room with a pair of leases, one of them ready filled, and the counterpart about half filled up; that John Brady left the clerk in the room filling up the counterpart of said leases; and in some short time returned with Counsellor Gregg, and Brady asked Counsellor Gregg to look at the lease, which he refused to do, perceiving that James Butler was intoxicated: and Gregg immediately directed that Butler should be put to bed, and desired he would get no more liquor; and told Brady, that it was shameful of him to attempt to get leases executed by a drunken man; and said, that any act which Butler did in his present drunken state would certainly be set aside: that Gregg then went away, and Michael Dannaher then filled up the counterpart of the lease: and deponent saith, that two men had come into the room, one a tenant of James Butler, namely, Bartholomew Scanlan, and the other of the name of Sheehan, a kinsman of James Butler: and Brady turned both said men out of the room, and caused James Butler to sit up in his bed, and Brady and Dannaher produced the leases to James Butler, who then signed the leases in presence of this deponent and Michael Dannaher, who subscribed their names as witnesses thereto, deponent having become a witness thereto, not considering the leases as fairly and honestly executed, but at the desire of Mrs. Butler, in order to be enabled, at a future day, to state the manner in which they were executed and the

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unfairness of the transaction; and deponent positively saith, that James Butler was, at the time of the execution of the said leases, which was about two o'clock in the day, *intoxicated and totally unfit and incapable of doing any solemn or serious act*: and deponent saith, that in some short time afterwards Mrs. Butler came into town, and on hearing that her husband had executed the leases, she enquired what the rent was, and for what term: and deponent saith, that upon investigating the leases, deponent for the first time discovered that they had been filled up at the yearly rent of thirty pounds, instead of two hundred pounds, as deponent had supposed, according to the low proposal made by John Brady.

Jonathan Gregg in his deposition stated, “ that
“ Brady had consulted him on the subject of
“ the renewal, and the differences between him,
“ (Brady,) and Butler; that he, Brady, on account
“ of Ringrose’s claim, had been in treaty with
“ Butler to obtain a lease of the lands to himself;
“ —that Butler, in the presence of deponent, had
“ insisted that all right to renewal had been forfeited by the neglect of the tenants;—that on
“ a subsequent day, between twelve and one
“ o’clock, deponent accompanied Brady at his
“ request, and upon his allegation that Butler had
“ agreed to execute the leases which Dannaher
“ was preparing at a public house in the neighbourhood; that upon going to the house,
“ he found Dannaher writing at a table, and James
“ Butler seated on the side of the bed, with a
“ table, a jug, and glasses near him; and that

“ upon addressing himself to James Butler, he
 “ found him *so stupidly intoxicated, that he could*
 “ *not give a collected or rational answer*, where-
 “ upon he immediately remonstrated,—repre-
 “ sented to Brady the invalidity of the lease
 “ proposed to be executed under such circum-
 “ stances, and departed.”

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Several other witnesses deposed to the same facts, and the intoxication of Butler was denied only by Dannaher. There was also proof that John Brady, after having obtained the lease, called upon Mrs. Butler, and declared “ that he
 “ never intended to make use of it;—that he had
 “ obtained it only to drive Ringrose to a com-
 “ promise, and when that object was effected, he
 “ would give it up to be cancelled.”

Depositions were also made to establish the allegation, that Walter Weldon Molony and Dr. Spellisy, his wife’s father, had full notice before the settlement was executed, that the lease in question had been obtained by fraud, and that it was the intention of Mrs. Butler and the Appellant to question its validity.*

All the material deeds set forth in the pleadings were proved in the Court below, and in evidence before the House.

* According to the view of the case taken by the House of Lords, the question of notice became immaterial.

The judgment was moved by Lord Redesdale, with very few observations. The Order penned by the noble lord is so distinct, accurate, and comprehensive, that a report of the judicial observations would be superfluous.

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For the Appellants, *Mr. Fonblanque, Mr. Horne.*
—For the Respondents, *Serjeant Copley, * Mr. Wingfield.*

After hearing arguments for the parties, the following order was pronounced: “ It is ordered
“ and adjudged, That the decree complained of
“ in the Appeal be reversed: And it is hereby
“ declared, That the indenture of lease of the
“ 11th July, 1783, in the pleadings mentioned,
“ from James Butler, deceased, father of the
“ Appellant, to John Brady, deceased, in the
“ pleadings mentioned, ought to be, and is hereby
“ deemed to have been obtained by the said John
“ Brady by fraud and imposition; and the same
“ ought to be, and is hereby deemed void, and of
“ no effect, so far as the said John Brady had any
“ interest therein, after the agreement entered
“ into by him with Philip Ringrose, in the pleadings mentioned, but without prejudice to the
“ rights gained under such agreement by the said
“ Philip Ringrose, claiming to be entitled to the
“ benefit of the lease of the 5th July 1718, from
“ Garret Gough to Joseph Ringrose, in the pleadings mentioned, and of the covenant for perpetual renewal therein contained, as the heir
“ at law of Jacob Ringrose, deceased, son of the
“ said Joseph Ringrose, and impeaching the will
“ of the said Jacob Ringrose, under which the
“ said John Brady claimed and had obtained possession of the lands comprised in the said lease

* Since appointed Solicitor-General.

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“ of the 11th July, 1718 ; in as much as it does
 “ not appear that the said Philip Ringrose, under
 “ the particular circumstances of the case, might
 “ not, if he had established his right as heir in
 “ contravention of such will, have been entitled
 “ to have compelled a renewal by the said James
 “ Butler, deceased, in his favour of the said lease of
 “ the 5th of July, 1718 ; and especially as the ex-
 “ ecution of the said lease of the 11th July, 1783,
 “ from the said James Butler, deceased, to the
 “ said John Brady, compelled the said Philip
 “ Ringrose to assert such right against the said
 “ John Brady : And it is hereby further declared,
 “ that the Respondent, Daniel Mulvihill, surviv-
 “ ing trustee in the marriage settlement of the
 “ 27th of December, 1794, in the pleadings men-
 “ tioned, in trust for the purposes in the said
 “ settlement expressed, claiming under the said
 “ Philip Ringrose, is entitled as against the Ap-
 “ pellant claiming under the said James Butler,
 “ deceased, to the benefit of the agreement en-
 “ tered into between the said Philip Ringrose and
 “ the said John Brady, so far as the same was for
 “ the benefit of the said Philip Ringrose : And
 “ it is further declared, that the said Respondent,
 “ Daniel Mulvihill, as such surviving trustee in
 “ the said marriage settlement, is entitled to have
 “ a lease of the lands comprised in the said lease
 “ of the 5th of July, 1718, in trust for the pur-
 “ poses in the said settlement expressed, subject
 “ to the terms of the agreement between the said
 “ Philip Ringrose and John Brady, save so far as
 “ such agreement was for the benefit of the said

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“ John Brady : And it is hereby further declared,
“ that the Appellant, as heir of the said James
“ Butler, deceased, being charged with the effect
“ of such agreement, for the benefit of the said
“ Philip Ringrose, is entitled to the benefit which
“ the said John Brady might claim under the said
“ agreement, and the lease of the 4th of July
“ 1793, from the said Philip Ringrose to him the
“ said John Brady :—And it is further ordered
“ and adjudged, that the said indenture of lease
“ of the 11th of July, 1783, and the said lease of
“ the 4th of July, 1793, be respectively delivered
“ up and cancelled :—And the Appellant, under
“ the circumstances aforesaid, waiving by his
“ counsel his claim to dispute the right of the said
“ Daniel Mulvihill, as such surviving trustee, as
“ aforesaid, to the lands of Teneshire and Island
“ Grady, comprised in the said leases of the 11th
“ of July, 1783, and 4th of July, 1793, and sub-
“ mitting to execute to the said Daniel Mulvihill,
“ as such surviving trustee as aforesaid, a lease of
“ the whole of the said lands comprised in the
“ said leases respectively, according to the terms
“ of the agreement between the said Philip Ring-
“ rose and John Brady, save so far as such terms
“ are varied by this judgment :—It is further or-
“ dered and adjudged, that the Appellant do ex-
“ ecute to the said Daniel Mulvihill, as such sur-
“ viving trustee as aforesaid, a lease of all the said
“ lands, as if the same had been all comprised in
“ and specially described by the said lease of the
“ 5th of July, 1718, subject to the rents and co-
“ venants, and according to the covenant for per-

“petual renewal contained in the said lease of
 “the 5th of July 1718; and that thereupon the
 “said Daniel Mulvihill, as such surviving trustee
 “as aforesaid, do execute a lease to the Appellant
 “for three lives, renewable for ever, of all the
 “said lands, reserving the same rent, and
 “under the same covenants and agreements as
 “are contained in the said lease of the 4th of July,
 “1793, from the said Philip Ringrose to the said
 “John Brady; and that such leases respectively,
 “be settled by one of the Masters of the said
 “Court of Chancery, in case the parties shall
 “differ about the same:—And it is further or-
 “dered and adjudged, that such of the Respon-
 “dents who are or may be in possession of the
 “lands in question, or any part or parts thereof,
 “do forthwith deliver possession thereof to the
 “Appellant:—And it is further ordered and ad-
 “judged, that the Appellant is intitled to an
 “account of the rents and profits of the said
 “lands, from the time of filing his bill, subject to
 “the rent of 142*l.* reserved by the said lease of
 “the 4th of July, 1793, of which there ought to
 “be paid to the Appellant the rent of 30*l.* re-
 “served by the said lease of the 5th of July, 1718:
 “—And it is further ordered, that the said Court
 “of Chancery do give directions for taking such
 “accounts against the several persons who have
 “been in possession of such lands since the filing
 “of the Appellant’s said bill, and do order the
 “payment by such persons, or their representa-
 “tives, of what shall appear to be due thereon:—
 “And it is further ordered, that an account be

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“ taken of all sums of money which may have
 “ accrued due to the Appellant for renewal-fines,
 “ according to the terms of the said lease of the
 “ 5th of July, 1718, since the date of the deed of
 “ the 3d of July 1793, whereby the said John
 “ Brady declared the said lease of the 11th of
 “ July, 1783, to have been taken for the benefit of
 “ the said Philip Ringrose; such account of re-
 “ newal fines to be taken according to the or-
 “ dinary course of the said Court of Chancery in
 “ taking accounts of such fines :—And it is further
 “ ordered and adjudged, that if any thing shall
 “ appear to be due to the Appellant on such ac-
 “ count, the same be paid by the Respondent,
 “ Daniel Mulvihill, as such surviving trustee as
 “ aforesaid, to the Appellant, before the delivery
 “ to the said Daniel Mulvihill, as such surviving
 “ trustee as aforesaid, of the lease hereinbefore
 “ directed to be made to him by the Appellant :—
 “ And it is further ordered, that the Court of
 “ Chancery do give all necessary directions for
 “ carrying this order and judgment into execu-
 “ tion; and particularly such directions as may
 “ be necessary on the return of the reports of the
 “ Master in Chancery, to whom any reference
 “ shall be made, in pursuance of this order; and
 “ do give such orders and directions touching any
 “ costs which may be incurred by any of the
 “ parties in carrying this order and judgment into
 “ execution as may be just.

* * According to modern decisions, the father of the Appel-
 lant, and, *à fortiori*, the Appellant himself, upon the evidence

appearing in the depositions, if the same had been given in the trial at law, ought to have recovered a verdict.

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In *Cooke v. Clayworth*, 18 Ves. p. 16. Sir W. Grant, M. R. said, he apprehended that a deed obtained from a man in such extreme state of intoxication as to deprive him of his reason, would be invalid even at law; and by *Cole v. Robins*, which is cited in Buller's N. P. p. 172, it seems, that in an action upon a bond, the Defendant pleading *non est factum*, may give in evidence that he was made to sign the bond when he was so drunk that he did not know what he did. In *Pitt v. Smith*, 3 Campbell's Rep. p. 34. Lord Ellenborough appears to have laid down a similar doctrine with great latitude. For according to the Report, he says, "Intoxication" (without limiting the degree) "is good evidence, upon a plea of *non est factum* to a deed; of *non concessit* to a grant; and of *non assumpsit* to a promise."

This doctrine appears to be contrary to the law, as laid down in Co. Litt. 247 a, who says, "As to a person who, by his own vicious act, depriveth himself of his memory and understanding, as he that is drunken,—that kind of *non compos mentis* shall give no privilege or benefit to him or his heirs." And again, "As for a drunkard who is *voluntarius dæmon*, he hath no privilege thereby," &c. The doctrine seems to be also contrary to the principle upon which it has been held that a man who is *non compos* shall not disable himself. The opinions have been various upon that subject:—But Littleton, in sect. 405, and Sir Ed. Coke citing the passage, and Beverly's case, are of opinion, that a man *non compos* cannot avoid his own act by entry, plea, or writ. And with that opinion accords the case of *Stroud v. Marshal*, Cro. Eliz. 398.

As to relief in equity against a deed or agreement obtained from a man when drunk, it is laid down, that the having been in drink is no reason for granting relief; for this were to encourage drunkenness. But if, through the management or contrivance of the party who obtains the deed, &c. the grantor, &c. was drawn in to drink, relief is administered upon the ground of fraud. See *Johnson v. Medlicott*, 3 P. W. 130. note A. See also *Rich v. Sydenham*, 1 Ch. Ca. p. 202.; *Cory v. Cory*, 1 Ves. 19.; *Cooke v. Clayworth*, *supra*, and *Cragg v. Holme*, there cited.

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The Scotch law makes an important and necessary distinction:—"Persons while in a state of absolute drunkenness, and consequently deprived of the exercise of reason, cannot oblige themselves; but a lesser degree of drunkenness, which only darkens reason, has not the effect of annulling the contract." See Stair, July 29, 1672, Ld. Hatton. So Erskine in his Instit. p. 822, says, "An obligation granted by a person in a state of *absolute and total* drunkenness, is ineffectual, because the granter is *incapable of consent*."

The rule of the French law, in cases of contract, is similar. See Pothier Traité des Obligations, p. 1. c. 1. art. 4. "Il est évident que l'ivresse, lorsque elle va jusqu'au point de *faire perdre l'usage de la raison*, rend la personne qui est en cet état, pendant qu'il dure, incapable de contracter, puisque elle le rend incapable de consentement."*

To satisfy this rule, the drunkenness must amount to a privation of reason; but in gambling contracts, the protection afforded by the French laws to drunkards is more ample.

For in such cases something far short of a privation of reason is sufficient to annul the contract. Pothier says, "Lorsque l'un des joueurs est dans un état d'ivresse, le contrat que renferme le jeu est nul, &c. Nous parlons d'une ivresse qui, sans rendre la personne absolument incapable du consentement, peut seulement rendre imparfait son consentement en l'empêchant de faire les réflexions qu'elle eût pu faire si elle eût été a jeun." Traité du Jeu, c. 1. § 1. art. 2.

So the law stood before the Revolution; and although the "Code Civil" forbids gaming, except upon martial or gymnastic exercises, and in general affords no remedy to the parties concerned, either to enforce the payment, or the recovery of money won or lost, yet the intoxication of loser at the time of playing, would form an exception, and the case would fall under the rule of the old law.

The Civil Law has no text upon this head. The only allusion to the subject, so far as I can discover, is in the Digest, lib. 49. tit. 16. s. 6. De Re Militari. "Per vinum aut lasciviam lapsis capitalis pœna remittenda est, et militiæ mutatio irroganda."

* See the translation of Pothier on Contracts, by Evans.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

JOHN SHAW STEWART, and Ro-	}	<i>Appellants.</i>
BERT STEWART		
WILLIAM M'KNIGHT CRAWFORD .		<i>Respondent.</i>
JOHN GEDDES	}	<i>Appellants.</i>
WILLIAM DONALDSON		
HUGH CRAWFORD		
HUMPHIREY GRAHAM		
JOHN SHAW STEWART, and Ro-	}	<i>Respondents.</i>
BERT STEWART		

WHERE freehold estates are conveyed under circumstances which may create a suspicion that the grantee is under an obligation, legal or honorary, to vote in the election of representatives in parliament, as the grantor shall direct—if the grantee, in the Freeholders' Court, or in the Court of Session, offers to be examined upon interrogatories, the Court has power to administer such interrogatories *ex officio*. Whether such obligation is a valid ground to exclude the grantee from the roll of freeholders—or only to reject his vote—Quære.

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An obligation, either legal or honorary, to vote as the grantor of the estate shall direct, accompanied by a correspondent obligation to re-convey the estate upon refusal to vote, according to the compact—is sufficient to invalidate the freehold and vote, and to warrant the exclusion of the claimant from the roll of freeholders. But mere political attachment, or feelings of gratitude on the one side, and expectations on the other, which do not amount to reciprocal or perfect obligation, are not disqualifications within the statute, 7 Geo. 2.

The words of the oath prescribed by that statute; “that any title, &c. is not created, in order to enable me to vote, &c.” are to be coupled in construction with those which follow: “But that the same is a real estate in me for my own use and benefit,” &c.

The penalty given to the party objecting to a vote by the

Scots Act, 1681, and 16 Geo. 2. cap. 11. is in the nature of damages; and therefore it seems that the party claiming the vote cannot object to a discovery on the ground that it may subject him to such penalty.

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IN the year 1815, the Earl of Eglinton, having taken measures to revive a number of dormant * freeholds upon his estate of Eaglesham, in the county of Renfrew, went through the necessary process to separate the property from the superiority, and to reduce the titles into such a form, that he might dispose of nine superiorities in life-rent, of value sufficient to give to each of the dis-pones a vote for the county.† In pursuance of

* These freeholds are said to be dormant, because, the superiority and the property being in the same person, the right of voting in respect of the superiority is suspended, or the two rights of voting are merged in each other.

† By the Scotch Act, 17th Sept. 1681, the qualification of electors for counties is confined to those who are infeft in property or *superiority*, and in possession of a forty shilling land of *old extent* held of the king or prince, or where the old extent appears not, to those who shall be infeft in lands, liable to taxes, for four hundred pounds Scots, (33*l.* 6*s.* 8*d.*) of *valued rent*.

Superiority is the seignior, as distinct from the usufruct of land. A superior who has not the beneficial property, is the *mesne lord*, between the king and the tenant. The rent service, or quit-rent, accruing to the superior, used to be a mere acknowledgment of right, and frequently not exacted. But in consequence of late decisions upon the head of nominal and fictitious, a new system has been adopted, by which the transaction assumes the shape of a real bargain of sale and purchase.

See *Bell on Election Law*, p. 303.

The *old extent* is a valuation of the lands in Scotland, supposed to have been made in the reign of Alexander the Third, in order to ascertain the proportion which the different proprietors were to pay, of a subsidy raised for his daughter's tocher,

this plan, Lord Eglinton, directly, or by the medium of his agents, entered into a treaty, and finally addressed proposals to the Respondent in the first, and the Appellants in the four last appeals; and also to Mr. Martin, his agent; Mr. Simpson, partner of Mr. Martin; Mr. Crichton, his factor; and a Mr. M^rKerrell; offering to sell and convey to each of them a life-rent superiority in the lands above-mentioned, sufficient to afford a freehold qualification, with a feu duty, payable by

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or portion, upon her marriage with Eric, King of Norway. Lands which were computed at 40s. in this old valuation, entitle the holder in life-rent superiority to be put on the roll of freeholders, whether they amount to 400*l.* valued rent, or not. But as by the statute of the 16th of Geo. 2. cap. 11. sect. 8. no other evidence of old extent can be admitted, but a retour of the land prior to the 16th Sept. 1681, the most general and easiest method of making out a qualification, is by what is called, the valued rent. A retour is an *inquisitio post mortem*, or verdict of a jury, who are summoned to inquire into the title of a claimant to succeed as heir to the estate of his ancestor.

The *valued rent* is a valuation of the lands in the different counties in Scotland, made in the time of the Commonwealth, and adopted after the Restoration.

An estate for life, in a superiority, of the value specified in the statute, entitles such superior to vote in the election of a representative for the Commons in Parliament. By dividing a large estate into such superiorities, and granting them for life, as many votes may be created as the number of forty shilling lands, or the amount of the valued rent of the whole, will bear. But this may be limited by the objections of the tenant, upon whom the lord is not at liberty to put a new superior without his assent. The practice of splitting superiorities to create votes has become so common in Scotland, that, in most counties, two or three proprietors (generally Peers) are, in effect, the electors of the representatives in the House of Commons.

See *Wight and Bell on Elections*, and *Ersk. Inst.*

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him as vassal to each life-renter. The disponent was to pay a price for his grant, in proportion to the feu duty receivable by him during his life, the value to be ascertained by reference to some of the common tables for calculating annuities.

Before the conclusion of the treaties upon this first proposal, it having been suggested to Lord Eglinton, by one of the intended purchasers, that an objection to the votes might arise, if the price given was a mere equivalent for the life-interest in the feu duty, that something ought to be added to the price for the freehold qualification; and that it would be expedient also, to prevent objections,* that the agents for the purchasers should prepare the respective dispositions in their favour; new proposals, framed upon these suggestions, were made to the several gentlemen selected as purchasers. These new terms were immediately accepted by all the intended vote-holders, and dispositions were accordingly completed, either upon making small additions to the price of each freehold, or by small reductions in the feu duty; so as to add or leave a consideration for the freehold, conferring the right to vote upon these titles.

At the Michaelmas head court, in 1816, claims of inrolment were presented on behalf of the several disponents, claiming rights to vote under the life-rent qualifications. The inrolments were opposed on behalf of the freeholders, by the Respond-

* These precautions were suggested upon consideration of the grounds of former decisions, by which freeholds had been held nominal and fictitious, and votes rejected under similar circumstances.

ents in the four last appeals, and objections were lodged in their names, as members of the court of freeholders ; upon the ground, that the freeholds were held upon terms of confidence, nominality, and dependence. These objections, having been considered by the court of freeholders, were sustained, and all the claims were rejected as inadmissible ; although the Claimants, who were present, offered to submit to examination, upon oath, as to the nature of their estates, and the terms on which they held them. The matter was then brought before the Court of Session, by petitions and complaints, at the instance of each of the claimants, appealing against the judgments of the freeholders, affirming their independence in the transaction, and their ignorance of any unlawful views, by which Lord Eglinton might have been actuated. These allegations they offered to establish *by their declarations on oath,* if the Court would direct interrogatories* to be administered to them upon the subject.

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In the mean time, those who objected to the votes, presented a petition to the Court, craving a diligence for the recovery of writings relating to the transaction between the Earl of Eglinton and the petitioning tenants of his freeholds. By an interlocutor, dated Feb. 1, 1817, the Court granted to the objectors a power to recover all letters regarding the freeholds, which might have passed previous to the dates of the several dispositions between Lord Eglinton and his agent, on the one hand, and the proposed freeholders and their agents on the other. By virtue of this diligence, the cor-

* See the Note, p. 178.

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respondence was obtained, which comprises the substance, and forms the evidence of the case.* Upon the production of this correspondence, replies and duplies were ordered by the Court, and given in by the respective parties. Whereupon the Court having formed an opinion, that the confidential nature of the freeholds had been established by evidence, ordered all the petitions and complaints to be dismissed, finding that the titles of the Complainants were nominal, confidential, and fictitious, and sustaining the objections to the claims of enrolment; and further found the Complainers liable to the Respondents, in the penalty of 30*l.* sterling, in terms of the statute.†

* The correspondence, so far as it is made the subject of observation in the judgment, and enters into the reasons and grounds of the decision, is printed in the Appendix subjoined to the case.

By that correspondence, and the judgment, the slight distinctions and varieties in the cases of the several Appellants in the last four, and the Respondent in the first appeal, will sufficiently appear. It has been thought most convenient, and best suited to a clear apprehension of the subject, to state in the text no more than a general outline, comprehending the substance of all the cases.

† The Scots statute of 1681, Sept. 17, No. 21, which prescribes the mode of making up the roll of freeholders for the election of commissioners for shires, and the form in taking objections, and the process for obtaining a final decision upon such objections, provides that, “ If the persons objected against shall appear at the parliament, or convention, and instruct the right to vote, the objector shall pay their expenses, and be farther fined in 500 marks; and if the objection be sustained in parliament, the objectors appearing shall have their expenses, and the party objected against shall be fined in 500 marks.”

This statute is explained and amended by the 16th Geo. 2. cap. 11. which gives a penalty of 30*l.* against a claimant rejected by the freeholders, and appealing to the Court of Session.

Some of the parties, without reclamation or appeal, submitted to the judgments pronounced against them ; but the Respondent, Mr. M'Knight Crawford, presented a petition, reclaiming against the interlocutor made in his case. This petition, complaining of the judgment, contained a request that he might be personally examined as to the facts of the transaction. In compliance with the order of Court, the Appellants in the first appeal gave an answer to this petition, declining to refer any thing to the oath of the Respondent, and insisting that the Court had no power to order the examination requested. On advising the petition and answers, the Court, on the 14th of Nov. 1817, pronounced an interlocutor, directing that a condescendence should be given in, containing such interrogatories to be answered by the petitioner, as the objectors might judge material, to ascertain how far the petitioner's qualification was nominal, fictitious, and confidential, or defeasible.

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In pursuance of this order, a condescendence was given in, containing general interrogatories,* to be administered to the Respondent. The objectors, Appellants in the first appeal, at the same time protesting by a minute, that the interrogatories did not originate at their instance, and submitting that Mr. M'Knight Crawford should be interrogated, if at all, by judicial examination, either in the presence of the Court, or before a commissioner, and not by answers deliberately prepared, and returned in a written form. It was, however decided that the answers should be in writing ; and they were so made accordingly.*

* See the interrogatories and answers in subjoined Appendix.

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Upon advising these answers, the Appellants in the first appeal having craved, that certain incidental questions, suggested by the answers, should be put to and answered, *viva voce*, by Mr. M'Knight Crawford; an interlocutor was pronounced on the 5th of Feb. 1818, whereby the Appellants in the first appeal were directed to lodge a minute, containing the additional interrogatories, which they proposed to administer to Mr. M'Knight Crawford. A minute, containing a few additional interrogatories, was lodged accordingly, and answers in writing were put in by the Respondent, Mr. M'Knight Crawford.

The whole cause, between the parties in the first appeal, came on to be finally heard on the 12th of Feb. 1818; when the Court, having considered the petition, answers, additional interrogatories, and answers to both, altered the interlocutor reclaimed against and found that the petitioner, in virtue of titles produced before the freeholders, was entitled to be enrolled in the roll of electors, and that the objections to his title were not relevant. Therefore they granted warrant to, and ordained, the Sheriff-clerk of the county of Renfrew, to add his name to the roll. The Appellants in the first appeal, on the 4th of March, 1818, presented a petition, re-claiming against the judgment, but the petition was refused, without answers, by an interlocutor pronounced on the 7th of March, 1818.

In the last four cases,* the Appellants also re-

* The facts of the case as they relate to the appeals, with slight differences appearing in the subjoined correspondence, are very nearly similar. The only varieties material to be noticed

claimed against the judgments, but they were finally confirmed by the Court of Session. Against these several decisions of the Court below, the parties respectively appealed to the House of Lords.

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The Attorney General, Mr. Charles Warren, Mr. Brougham, Mr. W. Adam, and Mr. Robert Grant, appeared and argued on different sides for the respective parties.*

The principal questions argued were as follows : Arguments and questions.
Jan. 27, 30.
Feb. 1, 3, 5.

1st, Whether there was any agreement, understanding, or honorary engagement between the Earl of Eglinton and the several grantees, that they should vote under his influence, and as he

are, that as to the letter which is called the first circular from Lord Eglinton, there was no proof that it was directly communicated to Mr. McKnight Crawford; that the purchase of his vote was transacted through the medium of Mr. Hugh Crawford, in the manner which will appear by the letters passing between the parties; and that Dr. Donaldson was the family physician of Lord Eglinton; a circumstance which formed a subject of observation in the printed papers, and the arguments before the House of Lords.

Of the nine life-rent dispositions, which were the subject of litigation in the Freeholders' Court, and the Court of Session, five, being the cases above reported, were brought before the House of Lords by way of appeal; one was re-disposed to Lord Eglinton; and upon the remaining three, judgments were given, finding them nominal and fictitious, and the parties did not appeal.

* The arguments occupied five days of hearing. They are not inserted on account of their length. The most material appear in the above abstract of the questions discussed; and in the opinion delivered by the Lord Chancellor.

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directed ; and whether such agreement, &c. could be inferred, from mere inadequacy of price.

2d, Whether it was sufficient to invalidate the vote, that such an agreement, &c. existed, unless it were rendered effectual by a concomitant agreement to re-convey the estate upon breach of the engagement as to voting, or unless the estate were in substance held in trust for the grantor, and whether such trust could be inferred from an honorary engagement to vote as the grantor should direct.*

3d, Supposing such understanding existed between the Earl and his agents, whether the proof of that fact, and the inferences to be drawn from their intercourse and correspondence with each other, or with any of the parties, could be evidence to affect the rights of other parties, and how far, and at what particular time, if at all, the grantees or any of them had adopted the agents of the Earl, as their agents in the transaction, so as to be affected by their acts and declarations.

4th, Whether the facts proved were sufficient ground to adjudge the votes nominal and fictitious ; or whether the oath of verity,† or interro-

* Whether the grantee in such case is bound to re-convey, was a question discussed in *Forbes v. McPherson*. Lord Thurlow inclined to the affirmative of that proposition. See the judgments in this case, and the opinion of Eldon, C., as to the equitable right of the grantor in a similar case. *Curteis v. Perry*, 6 Ves. Jun. 747. citing a case before Lord Kenyon, where a father had conveyed an estate to a son to qualify him to sit in parliament, and, the purpose having been answered, filed a bill to have a re-conveyance, the bill was dismissed with costs.

† See the Note, p. 178.

gatories respecting the purity of the transaction, ought to have been administered to the parties before the final decision of the Court of Session; and whether the Court had authority to direct such proceeding upon the requisition of the claimant, where it was opposed by the freeholders objecting to the votes.

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5th, Whether interrogatories could be administered to a party, who, by the answers, might subject himself to penalties by the Scotch act, 1681, and the English act, 16 Geo. 2. cap. 11. sect. 4.*

6th, Whether the grant of the superiorities did not constitute sufficient freeholds to entitle the grantees to be put upon the roll,† although the

* These penalties relate only to proceedings before the superior Courts, and not to proceedings before the Court of Freeholders. Whether this objection is competent to any but the party examined—Query. By the Scots Act, 1681, if the objection of the freeholders, to put the claimant on the roll, shall, upon petition, be sustained in parliament, the objectors appearing shall have their expenses, and the party objected against shall be fined 500 marks.

By the stat. 16 Geo. 2. cap. 11. sect. 6. which gives to either party aggrieved a summary appeal to the Court of Session, if the judgment of the freeholders, refusing to admit, or striking any person from the roll, shall be affirmed by the Court of Session, the party complaining shall forfeit to the objector 30*l.* sterling, with full costs of suit. As to the examination of parties upon oath, see Ersk. Inst. b. 4. tit. 2. sect. 8, 9. and the note, as to the exceptions in cases of prosecutions for penalties, and of interrogatories under the game laws, which are admitted, notwithstanding the liability of the party to penalties. See also the Note, p. 178, and further observations on this point.

† A freehold may be conveyed under such circumstances, that the party holding it would have no right to vote in the election of a Member of Parliament; yet he has many other duties and

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facts proved might have furnished valid objections to their votes.

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In the course of the arguments, the following were the principal authorities cited and discussed.

Forbes v. M'Pherson.* Fac. Coll. 6th March, 1789; D. P. 19th April, 1790; Luders on Elect. v. 3, p. 387.

Elphinstone v. Todd. Fac. Coll. 1st March, 1787; D. P. 30th April, 1787; Luders on Elect. v. 3, p. 394, App.

Case of Stewart Soutar. Fac. Coll. 3d March, 1807. *Fleming v. Drummond*, D. P. 23 July, 1811.

Stein v. Campbell, 18th Nov. 1815.†

Sir H. Moncrieff v. J. Campbell, 3-tius. W. S. 1813.‡

rights as a freeholder, for the purpose of performing and enjoying which, he ought to be put upon the general roll. The Stat. 1681, speaks of the election roll as a distinct instrument.

* In *Forbes v. M'Pherson*, the oath of verity was tendered, and inquiry prayed, by the freeholders objecting to the votes.

† In this case, the Court of Session found that the estate was nominal and fictitious, upon proof of an understanding between the parties, that the freehold was to be used for the behoof of the grantor. At the next annual Court of Freeholders, the grantee produced a discharge from the grantor, of any obligation to re-dispose, express or implied; and he was then inrolled upon the same titles as before. But upon complaint to the Court of Session, it was ordered that his name should be struck out of the roll.

‡ This case is not reported. The following are the circumstances under which it was assimilated to the present, and quoted, on behalf of the freeholders, in support of the objections to the votes. Mr. Campbell (the defender) was agent for Mr. Graham, of Kinross. In 1806, he wrote to him as follows: " I think a seat in parliament would be desirable for you in many points of view, and therefore take the liberty of suggesting to

Burnet's Case. Dict. of Dec. tit. Member of
Par. 8754, 30th July, 1745. 1819.

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"you, that it may be proper to secure yourself against all risks
"by giving votes to some of your friends." The writer afterwards added, "My brother, George Brown, got a vote from
"Mr. George Graham, but the titles never were delivered, and
"he has not on that account taken it. Were you to confirm this
"conveyance, as he has been some years infest, his vote would
"be immediately a good one. To secure yourself, you would
"require *at least other five*. Mr. Templar, I believe, would accept of one ; and I once, I think, heard him express a wish to
"that effect. Dr. Henderson would be a safe one ; and if no
"other occurred, William Brown, my brother-in-law, of the
"Lisbon house, now resident here, might answer, and would
"give a small purchase money to secure it from challenge. I
"have requested Mr. Templar to write to you on the subject ;
"and on mature reflection, I think it a matter of such consequence to you, that I have extended a disposition by you to
"Messrs. Templar, George Brown, and myself, of five votes,
"which I enclose, that if you think right, you may sign it according to the instructions annexed to it."

Mr. Graham acceded to this proposal, and signed the disposition, after which Mr. Campbell again wrote to him as follows :
"I wrote you in answer to the first, and prefix a copy of my
"letter, and have to acknowledge receipt of the dispositions
"and mandates, with which, I trust your friends will be able to
"secure you a seat in Parliament. You do not mention the
"names of these you mention to have enrolled. Should the attornies approve, I would suggest the following : 1st, Mr.
"Templar's son ; 2d, Mr. George Brown ; 3d, Mr. William
"Brown ; 4th, John Campbell. These superiorities being taken
"to support your interest, I reckon their value as follows : The
"average price of superiority over Scotland may be taken at
"400*l.* sterling for a vote ; but Kinross is only represented every
"second parliament. The value may therefore be taken at one
"half, or 200*l.* This is the value of a proprietor in the county,
"who wishes, besides having a vote, to connect his property
"with a freehold. To those who have no property, but who
"take it to support a friend, I would reckon 150*l.* a fair price.

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Hon. Spencer Chichester v. Sir Murray Maxwell. Fac. Coll. 28th Jan. 1809.

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" This price I am very willing to pay, and I have no doubt that those whom I have mentioned will not stumble at it."

In the month of May, 1809, some other votes in Kinrossshire having sold much higher than Mr. Campbell had calculated, he wrote to Mr. Graham in the following terms: " Whilst on the subject of superiority, I think it proper to mention, that the value having gone far beyond my idea of it; and, of course, the calculation on which I proposed the price to be paid by your friends, who took the votes with the view of supporting your interest, turn out inapplicable, I consider myself bound to give up the vote, which on these principles I got to myself. The price of 150*l.* sterling, which, with interest, was to be paid out of the money to be drawn from India, is quite under the mark, which, in proportion to the 375*l.* should be at least 250*l.* I beg leave, therefore, to re-dispose to yourself, or any friend you may wish." In answer to this letter, Mr. Graham, of this date, said: " In regard to your own qualifications, it is my wish that it should remain as originally arranged, with this exception, that in the event of your having a wish to relinquish it., I should have an option of taking it back on the same terms." To this letter, Mr. Campbell answered thus: " I delayed troubling you, in hopes of seeing you here; but as the time draws near for lodging claims of enrolment, I think it necessary to mention, that I do not consider such an understanding, as that mentioned in your last, at all safe. It would be considered as evidence of the vote being nominal and fictitious. Whatever votes you make, therefore, you must consider as real conveyances, and it is in that view I feel such delicacy in retaining the vote. When I stated the 150*l.* as the price payable by your friends, I looked on 250*l.* as the most a vote could go to; and I consider the value of 250*l.* as not too much to make up for the loss of interest on the 150*l.* whilst it should be held, as the holders could reap no benefit from the property. As the price however has gone so high, I do not see any plan that can be followed, but my giving it up, or advancing the price a little. I could not conveniently go above 200*l.*, but I am willing to give this sum, and thus make the vote a good one.

Drummond v. Adam, ditto, 26th Jan. 1813.*

Montgomery v. Dalrymple, 2d March, 1813.†

Case of Gordon of Cluny, June 27, 1807.

——— Belches, June 29, 1809.

Wigton Cases, June 29, 1805.

Case of Proby. ‡

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“ There can be no agreement about a return, but from the connexion that would follow of course. I beg to hear from you, as to this. In course, I shall lodge the claims.” Mr. Graham acquiesced in the proposition for valuing the vote at 200*l*. and Mr. Campbell was enrolled by the freeholders, but the Court of Session ordered him to be expunged from the roll, with costs.

* This was a case of gratuitous grant, at an elusory feu duty, by an uncle to a nephew. The Court of Session, upon complaint of a freeholder, ordered the name of the claimant to be struck out of the roll. The House of Lords, on appeal, remitted the cause—that interrogatories might be put to the claimant. He, by his answers, having denied that any confidence or understanding existed between him and the grantor, his right to enrolment was confirmed.

† This case is not reported. The objection was, that the freehold having been taken in exchange for another freehold, in a different county—the mutual grantees being also candidates for the respective counties, at the ensuing election—was void, as nominal, fictitious, and confidential. But the Court of Session decided otherwise, and Lord Meadowbank observed: “ It is a confidence which the law allows. It is a motive for the grant of the vote; but does not affect its legality or independence. They have a mutual confidence in and affection for each other. There is no nominality, nothing fictitious. We have only to consider whether the freehold is held in trust. I do not see a vestige of any thing of the kind. The fee is given away. It is given absolutely to a personal friend. And is a personal friend incapable of receiving a gift?”

‡ In this case, a freehold gratuitously granted by Lord Seaforth to Mr. Proby, who had been his secretary, was held not nominal and fictitious.

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Case of Campbell, 1813, 14.*

Cheap v. Morehead. Bell on El. Law, p. 321,
Ed. 1812.

Campbell v. Muir, 5th Feb. 1760. Aff. on Ap-
peal, 1st Dec. 1760.

Stewart v. Dalrymple, 28th Feb. 1781. H. of
L. 30th April, 1782.

Skene v. Skene, 9th March, 1768. H. of L. 9th
May, 1790.

Lyndsay v. Drysdale, 6th March, 1788.

The substance and effect of the cases, which are
noticed here only by name, are to be found in
Bell on El. Law, p. 274 to 335.†

* This was another case of a gratuitous grant by Lord El-
phinstone, who was at that time Lord Lieutenant of the County,
to his clerk of lieutenancy and quondam secretary. It was held
valid.

† In the course of the argument, it was said, that answers to
interrogatories should not be confounded with the oath of ve-
rity. But the distinction (if any) seems to be little more than
nominal. Answers to interrogatories are declarations upon oath,
by a party either confessing or denying what is alleged or pro-
posed, by questions put at the instance of the adverse party, or
ex officio by the judge; as in the case of M^cKnight Crawford.

The law as to examination upon the oath of verity, so far as
it regards the subject discussed on this point, is thus stated by
Erskine, b. 4. tit. 2. sect. 8.

“ Though one’s right may be taken away by his own oath,
“ when, upon a solemn appeal to God, he is forced to acknow-
“ ledge that his claim is ill-founded, or cut off by a just excep-
“ tion; yet it is a self-evident proposition, that no man’s right
“ can, in the common case, be either proved by his own oath, or
“ extinguished by that of his adversary; because these are no
“ more than the averments of the parties themselves in their own
“ favour. From this rule, however, there is an exception in the
“ case of oaths, which are called *oaths of verity*, where the pur-

The arguments proceeded chiefly upon the foregoing authorities, and the construction and

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“suer, confiding in the defender’s veracity, or perhaps sensible that he can bring no other evidence, refers the point in controversy to his oath. For if the defender shall, upon such reference, swear that the pursuer’s claim was either groundless from the beginning, or is now extinguished by payment, it is entirely cut off by such oath, though the strongest evidence should be afterwards brought, that his claim was good. In the same manner, the right of a pursuer may be proved by his own oath, affirming it to be good, when the defender refers the point in issue to it. An oath of verity has so strong an effect, not because it can work any conviction in the Judge from the nature of the evidence; for no single testimony upon oath, of the most unsuspected witness, can be received in evidence; but it depends entirely on the transaction that is supposed to intervene between the party referring, and him who deposes, by which they put the issue of the cause upon what shall be sworn,” &c.

Sect. 9. “Oaths of verity cannot be urged against a defender in any trial properly criminal, so as to compel him to depose against himself. *Vid. infr. t. 4, sect. 94*; but in trespasses, where the conclusion draws no deeper than the damage of the person wronged, or a pecuniary fine, a defender may be compelled to swear; as in bloodwits before an inferior Judge: *Durie*, Feb. 13, 1634, (*Tait against Darling*, Dict. p. 7300); in batteries, *Fount.* July 24, 1678, *Gordon* (Dict. p. 9397) cited in folio Dict. 11, p. 14; and in injuries verbal or real, Clerk *Hume* 5, (*Fiscal of Edinburgh*, Jan. 2, 1736, Dict. p. 9400). The same was decided in a prosecution, brought by the procurator fiscal, on the Statute 1707, c. 13, ‘for preserving the ‘game,’ where the prosecutor restricted his claim to one penalty of 20*l.* Scots; *Fac. Coll.* June 27, 1787. *Procurator Fiscal of Edinburghshire*, Dict. p. 12442.

Sect. 14. “Oaths of verity, as they have been now explained, are oaths referred voluntarily by one party in a suit to his adversary; which therefore are finally decisive of the cause. But oaths of verity are sometimes put by the Judge *ex officio*, without reference by either party to the other;

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operation of the Scotch Act, 1681, the 12 Anne, st. 1. c. 6. and the 7 Geo. 2. cap. 16.*

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The Lord Chancellor.—The question in these cases relates to several interlocutors, which have been pronounced by the Court of Session, in the five several causes which have been heard at the bar; all of them involving a consideration of the same or similar points; whether the estates created by the Earl of Eglinton, according to the law of Scotland, are real or nominal and fictitious estates in the several persons to whom he sent, what is called, the circular letter; namely, one to Mr. Hugh Crawford, writer in Greenock; another not sent by himself, but communicated by

“ which, because they are necessary, and not grounded on any
“ implied contract between the litigants, are not final; so that
“ sentences proceeding on them may be declared void upon
“ proper vouchers afterwards recovered; or the cause may be
“ brought from the inferior Court to the Session, on this ground,
“ that the Judge ought not to have ordained the party to swear,
“ &c.”

* By the 7 & 8 W. 3. all conveyances, in order to divide the interest in any houses or lands among several persons, to enable them to vote at elections of members to serve in Parliament, are declared void.

By the 53 Geo. 3. cap. 49. it is declared, that demises by will shall be held conveyances within the meaning of the Act.

By the 45 Geo. 3. cap. 59. sect. 8. amending the Irish Act, 35 Geo. 3. cap. 29. it is enacted, that if any person shall fraudulently grant any interest, importing to be a freehold, which is not so, with intent to enable any person to vote, such grant shall be valid against the grantor,† for every purpose but enabling the grantee to vote.

† The word “and” seems here to be wanting in the clause.

Hugh Crawford to William M'Knight Crawford; another to Humphrey Graham, writer to the signet; another to Francis Martin, a writer at Paisley, who appears to have been a sort of agent to the others; and that communicated by him to a gentleman of the name of Alexander Simpson, his partner. There was likewise a letter sent to a gentleman of the name of Fulton M'Kerrell, who was a manufacturer at Paisley; and this circular letter appears, according to the statement I have in my hand, to have been communicated by him to his brother John M'Kerrell, likewise a manufacturer there. Fulton M'Kerrell gave up his freehold, as it is stated, in order to make way for William M'Knight Crawford. The seventh person particularized, is Mr. John Geddes. There appears likewise to have been (though we have not heard much of that, except that in the papers before me there is an occasional reference to it) a communication to a gentleman of the name of James Crichton, a writer at Irvine. And the ninth, was Dr. William Donaldson, physician in Ayr.

As I understand the proceedings of the Court of Session, the first division of the Court of Session decided, in the first instance, that William M'Knight Crawford's title was nominal and fictitious, but they seem afterwards to have thought it requisite, further to examine the grounds of that Judgment; and accordingly, under the direction of the Court, the persons who objected to this vote administered to William M'Knight Crawford, a great variety of interrogatories; and notwithstanding the inferences^u stated in the pa

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pers, and the implications as to what must have been the intention and understanding of William M^cKnight Crawford, drawn from the nature of the correspondence which took place between the Earl of Eglinton and his agents, and particularly Mr. Hugh Crawford, it is material to observe, that William M^cKnight Crawford, when the Court directed him to be examined upon interrogatories, has entirely, or to a very great extent, destroyed all those inferences and implications. Why similar inferences and implications should not be equally answered by others, whose cases were not much, if any thing stronger than his, I do not perceive.

With respect to Mr. Francis Martin, who was a writer in Paisley, very much connected with Lord Eglinton, it appears from one of his letters, that he certainly meant to accept this vote, in order to support the political influence of Lord Eglinton. He has thought it right, I understand, to abandon his vote. In so doing, it must be considered, that he has acted from a sense of honour, and propriety : for, notwithstanding the terms of this letter, I doubt whether he could have been compelled to abandon his vote.

Mr. Simpson, his partner, became a purchaser of one of those estates, in consequence of a representation made by Mr. Martin, in a letter to Lord Eglinton. He appears to stand very much in the same circumstance as Mr. Martin, and I understand that Mr. Simpson has likewise abandoned his vote.

Mr. Fulton M^cKerrell made way for William

M'Knight Crawford, whose vote has been sustained. Upon the correspondence of M'Kerrell, it is extremely difficult to say, that he was not bargaining for an independant vote ; and from that circumstance, I should have inferred that the person standing in his place, William M'Knight Crawford, was also bargaining for an independant vote. If we are permitted to infer from the acts of one man, to the intention of another, it may be difficult to answer the inferences which a suspicious mind would raise. From the acts of Hugh Crawford, who dealt for William M'Knight Crawford, to a certain extent, he was his agent. But if it can be shown, upon this correspondence, that Fulton M'Kerrell was really bargaining for an independant vote, and where Lord Eglinton appears not indisposed to let him have such a vote, it is difficult to suppose that a change was made with respect to the person to stand in his place.

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In the case of Mr. Geddes, the first division of the Court of Session having found that his titles were nominal and fictitious, he has complained of this interlocutor. What has been done with Mr. Crichton, I do not know : as he was an agent of Lord Eglinton's, he has probably abandoned his claim.

Then there follows the case of Dr. William Donaldson, who is a physician of Ayr. With reference to whom they found likewise, without examination of the party, that his vote was nominal and fictitious ; among other circumstances, upon this, that Dr. Donaldson is, as they say, the phy-

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sician of Lord Eglinton, and it has been contended in argument, that, being physician of Lord Eglinton, he could not purchase of his patient a substantial vote.

Appeals have also been made, by Mr. Hugh Crawford, who complains that his vote has been taken to be nominal and fictitious; by Mr. Graham, who complains that his vote has been taken to be nominal and fictitious; and by Dr. Donaldson, who makes the same complaint; that is, there are four persons who state that their estates are mere estates, affected by no obligation, either of a perfect or imperfect kind (I will state presently, why I use the term of an imperfect nature); and that they ought therefore to be put upon the roll, and be allowed to vote on elections. On the other hand, there is an appeal from the gentlemen who are the voters' objectors, with respect to the estate of William M'Knight Crawford; and who say, that the Court of Session is quite mistaken in finding that his estate was not nominal and fictitious. They insist that his estate is nominal and fictitious, although interrogatories have been addressed to him, which would puzzle, I think, Mr. Crawford, as much as many we have seen in this part of the island.

It is not my intention to discuss at present the law of Scotland, as to what does or does not constitute nominality and fictitiousness, further than I find it determined in cases. I think we shall be able to collect from these cases, and what has been stated in Judgment in this House, what this House has taken to be (if I may use such an ex-

pression) the common law of Scotland; by which I mean the law of Scotland as it has obtained, independantly of those statutes which have prescribed the rule to us, and likewise the effect of the law of Scotland with respect to those statutes which require an oath* to be taken to guard against nominality and fictitiousness. I do not enter into the discussion, because the law of Scotland is very fully stated in the cases, and therefore it would be a useless waste of time.

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It is not my intention to say one word upon the question, whether it is good policy, or whether it is likely to contribute to the purity of the constitution, that estates, not nominal and fictitious, but legal, should be reserved and created in the way in which it is acknowledged they may in Scotland. I accede to the notion of Lord Thurlow, who says: * “He must be a bold man, who undertakes, on any abstract ideas, to new model the constitution of a country.” We are not assembled here as a branch of the legislature, but as a Court of Session, to decide what the law is now, and not what it ought to be.

The Scotch statute, which passed on September 17th, 1681, regulates the election of commissioners for shires. According to the opinion of Lord Thurlow, supposing the subsequent statutes of Queen Anne and George the Second not to have passed, this objection of nominal and fictitious would have been just as good an objection, as it was after the acts of Queen Anne, and George the Second passed. This statute regu-

* In Forbes v. M'Pherson.

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lates the manner in which freeholders shall be allowed to vote. It was made to prevent delay in dispatch of public affairs in parliament, and convention of estates, occasioned by the controverted elections of commissioners for shires. It directs who shall vote in the election of commissioners; namely, those who shall be publicly infeft in property or superiority, and in possession. It provides for the making up of the roll, and at the time when the roll is to be made up, objections may be taken. The persons who, according to this statute, have a right of voting, are those who are publicly infeft, and in possession.

It then states, “ that if the objections shall not “ be cleared, and acquiesced, they shall take in- “ struments against the admitting to, or excluding “ any person from the roll, and that no other ob- “ jection shall be held competent in parliament “ or convention, but what shall be contained in “ the instruments taken as aforesaid.” (I observe here, there were other objections, besides those of nominality and fictitiousness taken in the Freeholders’ Court, and again at the election, but all abandoned, except those of nominality and fictitiousness.) Then it is declared, that if the persons objected against shall appear at the parliament or convention, and instruct the right to vote, the objector shall pay their expenses, and be farther fined in 500 marks; and if the objection be sustained in parliament, the party objected against shall be fined in 500 marks. I have read thus much of the statute, which has no application to the question before us, except as it describes the nature of the property which the

voters are to have, for the purpose of taking notice of this penalty of 500 marks. Upon which it may be enough for me to say, that, whatever my opinion may be upon what is to be found in the text writers and the practice of the law of Scotland, there is a great difference between acting upon the oath of the party directed to be administered in such cases, and a penalty given in the nature of damages to the party objecting. It may be open to argument, whether, when a statute gives a penalty, in any shape, the construction of that statute is to be a loose or a strict construction. I state this remark the more strongly, because, in addition to the penalty of 500 marks, the party is required to take the oath prescribed by subsequent statutes; by which it is further provided that the party shall not only be subject to a penalty, but be indictable for perjury.

The statute of the 12th of Anne says this :
 “ Whereas of late, several conveyances of estates
 “ have been made in trust, for redeemable elusory
 “ sums, no ways adequate to the true value of the
 “ lands, on purpose to create and multiply votes
 “ in elections of members to serve in parliament,
 “ for that part of Great Britain called Scotland ;
 “ Be it enacted, that from and after the determi-
 “ nation of this present parliament, no convey-
 “ ance or right whatsoever, whereupon infestment
 “ is not taken, and seizin registrated, one year
 “ before the test of the writs for calling a new
 “ parliament, shall, upon objection made in that
 “ behalf, entitle the person or persons so infest to
 “ vote, or to be elected at that election, in any

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“ shire or stewartry, in that part of Great Britain
“ called Scotland; and in case any election happen
“ during the continuance of a parliament, no conveyance or right whatsoever, whereupon in-
“ feoffment is not taken one year before the date
“ of a warrant for making out a new writ for
“ such election, shall, upon objection made in
“ that behalf, entitle the person or persons so in-
“ feft, to vote or be elected at that election.”
This part of the act seems to apply rather to occasionality than to nominality and fictitiousness.”

The next part of the act is applied to this point. “ And that from and after the said day, it
“ shall or may be lawful to or for any of the elec-
“ tors present, suspecting any person or persons
“ to have his or their estates in trust, and for the
“ behalf of another, to require the preses of the
“ meeting, to tender the following oath to any
“ elector; and the said preses is hereby empow-
“ ered and required to administer the same in the
“ words following: I *A. B.* do, in the presence of
“ God, declare and swear, that the lands and es-
“ tate of —, for which I claim to give my vote
“ in this election, are not conveyed to me in
“ trust, or for the benefit of any other person
“ whatsoever; and I do swear before God, that
“ neither I nor any person to my knowledge, in
“ my name, or by my allowance, hath given, or
“ intends to give, any promise, obligation, bond,
“ back bond, or other security, for re-disposing or
“ re-conveying the said lands and estates, any
“ manner of way whatsoever; and this is the truth,
“ as I shall answer to God.”

This statute does not in terms, as I perceive, enact, that a person shall be guilty of perjury, and suffer the pains of perjury as the subsequent statute does; but perhaps, one might venture to go the length of saying, that, without an express enactment, the party might be considered as guilty of perjury.

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The words of this oath deserve peculiar attention. It appears to me, from the language of Lord Thurlow, in the case of Sir John Macpherson, that he kept them in view, when he came to talk of what he called the honorary obligation. I was counsel in that case; and I have to this moment, a very lively recollection, that I considered this thing called honorary obligation, though very fit to be considered, was an extremely difficult thing, to be enforced by positive law. When Lord Thurlow speaks of honorary obligation, he uses an explanatory expression, which, in itself, suggests a good deal of difficulty to the trammelled mind of a lawyer, that you are to find, not merely that the voter has a motive operating upon his own mind, but you must be satisfied “that some sensation has passed out of the mind of the grantor into the mind of the grantee, and that the sensation has returned again, out of the mind of the grantee into the mind of the grantor;” so that there shall be an understanding between them, that the vote is to be used, as the author of the vote shall be pleased to direct. And Lord Thurlow seems to have been of opinion, that if a man was so circumstanced as to be under an honorary obligation, as to the use he was to make of the real

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estate, he must consider himself under the same obligations of honour to re-dispose the estate.

The statute of the 7 Geo. 2. which is entitled,

“ An act passed for the better regulating the election of members to serve in the House of Commons, for that part of Great Britain called Scotland, and for incapacitating certain persons to be elected, or to sit or to vote in that House—” that act recites, “ Whereas doubts may arise, whether the acts of parliament made in England, for preventing false and undue returns of members to serve in parliament, extend to that part of Great Britain called Scotland.” Then there is a penalty given against a false return. Then it is enacted, “ that every freeholder, who shall claim to vote at any election of a member to serve in parliament, for any lands or estate in any county or stewartry in Scotland, or who shall have right to vote in adjusting the rolls of freeholders, instead of the oath appointed to be taken by an act made in the 12th year of Queen Anne, shall, upon the request of any freeholder, formerly inrolled, before he proceed to vote in the choice of a member, or on adjusting the rolls, take and subscribe, upon a roll of parchment to be provided and kept by the sheriff, or steward clerk, for that purpose, the oath following, which the preses, or clerk to the meeting, is hereby empowered and required to administer, that is to say, I *A. B.* do, in the presence of God, declare and swear, that the lands and estate of —, for which I claim a right to vote in the election of a member to

“ serve in parliament, for this county or stewardry,
 “ is actually in my possession,” (those words are
 not in the act of Queen Anne,) “ and do really
 “ and truly belong to me,” (those words are not
 in the act of Queen Anne,) “ and is my own pro-
 “ per estate,” (those words are not in the act of
 Queen Anne,) “ and is not conveyed to me in
 “ trust, or for or on behalf of any other person
 “ whatsoever,” (those words are in the act of
 Queen Anne;) “ and that neither I nor any person
 “ to my knowledge, in my name, or on my ac-
 “ count, or by my allowance, hath given, or in-
 “ tends to give, any promise, obligation, bond,
 “ back-bond, or other security whatsoever,” (those
 words are in the act of Queen Anne). Then fol-
 low these words, which are not in the act of
 Queen Anne: “ other than appears from the tenor
 “ and contents of the title upon which I now
 “ claim a right to vote, directly or indirectly, for
 “ re-disposing or re-conveying the said lands and
 “ estate in any manner of way whatsoever, or for
 “ making the rents or profits thereof, forth-
 “ coming to the use or benefit of the person from
 “ whom I have acquired the said estate, or any
 “ other person whatsoever.” Then follow these
 words, upon which, if they had not received a ju-
 dicial construction, and received that judicial con-
 struction over and over again, I think it would
 have been very open to argument what the mean-
 ing of them was: “ And that my title to the said
 “ estates is not nominal or fictitious, created or
 “ reserved in me, in order to enable me to vote
 “ for a member to serve in parliament, but that

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“ the same is a true and real estate in me for my
“ own use and benefit, and for the use of no other
“ person whatsoever ; and that is the truth, as I
“ shall answer to God.”

If this had been *res integra*, I should have found it extremely difficult, in the case of any person claiming an estate under the circumstances now before us, to have advised that person to swear that his title to the lands was not created or reserved in him, in order to enable him to vote for a member to serve in parliament. But construction has put an end to all argument. It has been determined, that you are to take the whole of this sentence together, and that if the purpose be, as in this case I have no doubt it was the purpose of Lord Eglinton, to enable the party to vote in elections to parliament, yet the words following are to qualify those words, namely, “ that the
“ same is a true and real estate in me for my own
“ use and benefit, and for the use of no other per-
“ son whatsoever ;” and that, although an estate should have been created or reserved, in order to enable a party to vote for a member for parliament, yet, if it was a real estate in him, vested in him for his own use and benefit, though the purpose was to enable him to vote for a member in parliament, yet, if he was under no obligation in point of honour to vote otherwise than his judgment would direct him to vote, the estate, nevertheless, was not to be considered as nominal and fictitious, but to be considered as a good estate.

Upon the authority of decided cases, these

principles are considered as now settled by the law of Scotland; namely, that if the estate is really an estate vested in a person for his own use and benefit, if it be an estate of a quality to give a vote for a member to serve in parliament, the extent of it is of no consequence; and if *bona fide* given without consideration, the fact of its being so given is no objection to the vote. I have found no case in which it has been decided that if the sensation in the mind of the grantor does not pass to the mind of the grantee and the sensation in the mind of the grantee does not pass back again to the mind of the grantor—if there is not an understanding created between them, that the man shall vote as the grantor of the estate shall direct him to vote, that it will not be a good vote. It has been held, and Lord Thurlow himself has stated, that he cannot meddle with estates when the persons voting in respect of them, vote from gratitude, or common obligation, but that there must be a sort of paramount and perfect obligation disappointing the law, as he expresses it; an understanding, that the man who made the vote made it for the purpose of making the grantee his creature, and that the man who took the vote understood that he so took, and was under, if we may so call it (I cannot easily define it), an honorary obligation, that he would in truth become the creature of the man who meant to give him the estate, for the express purpose of his voting as he the grantor pleased. I should apprehend, that Lord Thurlow must have conceived (as it appears from the tenor of his judgment in

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the case of Sir John M'Pherson) that this did not depend upon the oath, but was in the nature of the parliamentary law of Scotland. It would, indeed, be very difficult to apply to an honorary obligation the words which are contained in the statute: "In case any person shall presume wilfully and falsely to swear and subscribe the said oath, and shall be thereof lawfully convicted, he shall incur the pains and penalty of perjury, and be prosecuted for the same, according to the law and form in use in Scotland."

In a Civil Court, much might be effected, according to that case of Sir John Macpherson. Where an oath is administered to the parties, the grantee may declare upon his oath, that he was not bound, that he would not have taken the estate, if there had been any suspicion that he was bound in honour; that the grantor may also declare that there was no such understanding on his part; that in creating votes for members of parliament, he would much rather give those votes to his political friends, and to men of his own turn of thinking, under the notion that, morally speaking, they were much more likely to support his own notions of the constitution of the country, than other persons who differed from him. But, on the other hand, if both parties were to pledge themselves by their oaths, that whatever were the language, or the appearances, neither the one nor the other had any such intention; that no such understanding or obligation existed; it would be a very bold measure, to say, on the general words of this oath, that the parties must be convicted of

wilful perjury. It must, therefore, I apprehend, have been the idea of Lord Thurlow and this House, in the case of Sir John Macpherson, when they resorted to the term "honorary obligation," that it was not the thing prohibited by this oath, but that kind of understanding, which it is very difficult to prove exists, but which, when proved to exist, this House has undoubtedly determined, would vitiate the vote, upon the ground that it was not a real, but a fictitious estate; that the grantee was bound in honour to make no use of it; and he is equally bound in honour to re-dispose it, lest he should make use of it. In other words, to make the honorary obligation equal to the effect of the oath, where the honorary obligation existed, inducing the consequence in law that the estate was not a real estate, and inducing a further consequence in law, if the estate could not be used; namely, the obligation to re-dispose it.

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In *Forbes v. Macpherson*, it is material to consider what this House must be taken upon the record to have decided. For the Judges of the Court of Session have, in all the cases now before us, except the case of *Macknight v. Crawford*, refused to direct an examination, which this House required in *Forbes v. Macpherson*; yet the Judges of the Court of Session suppose they have been acting upon the authority of this House in the case of *Macpherson*.

I have stated what appear to me to be principles established, and they may be taken so

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to be. Yet there is no denying, on the other hand, that if a doubt fairly arises, whether the vote is nominal and fictitious, or not, you will look at all the circumstances; you will inquire whether the man has the possession; you will look at the want of consideration; and in every case of that kind, there may be a number of circumstances creating suspicion, which would, on sound principles, mature a suspicion into judgment, that the estate was nominal and fictitious. But then I see Lord Thurlow, when he was venturing upon this extremely delicate and difficult ground, this thing called honorary obligation, states himself thus, “ It must be upon the general “ state of the transaction, that the Court may “ collect, that the estate, instead of being intended “ to be used or disposed of by the grantee, was “ intended between them, to be at the use and “ disposition of the grantor, and whenever a case “ affords circumstances sufficient, fairly and “ roundly to raise that presumption in an unanswerable degree, or to raise it in a degree which “ the party himself cannot answer,” (that is, cannot answer by his oath) “ in such a case as that, the vote must be held to be void.” Then, Lord Thurlow here requires that the circumstances should fairly and roundly raise that presumption, in an unanswerable degree. I observe here, that the Judges of the Court of Session were at first of opinion, that in the case of M’Knight Crawford, the presumption was raised in an unanswerable degree; but when they have put the

party to answer, he has answered in a clear and unequivocal way, and they have reversed their judgment.

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Taking the whole of what Lord Thurlow says together, he does not mean to say, that he would not raise the presumption, merely because the party answers it. His expression is, if the presumption is raised in a degree which the party himself cannot satisfactorily answer. He appears to be of opinion, (and I think the case imports as much,) that although the party has been examined on interrogatories, yet, if the case required you to disbelieve the party, (it is another question, whether you believe him or not,) you might disbelieve him, provided the circumstances had fairly and roundly raised such a presumption, that his answer to it could not get the better of that presumption, and could not repel it, and drive it out of the judicial mind of the court.

This being the way in which the matter was treated in the case of *Forbes v. Macpherson*, it is hardly necessary to state the former case of *Elphinstone v. Todd*, Lord Thurlow's judgment in which is set forth in the printed cases.* In the later case, I think I shall be able to determine what must have been the meaning of the House. As the case is stated, it is said, "It is
"believed no country can afford a more remark-
"able instance, than the county of Aberdeen,
"where, by parcelling out the superiority of lands
"contained in one charter, a noble Duke has at-

* See the judgment in *Luders, Election Case*, vol. iii. p. 371.

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“ tempted to add to the roll of freeholders, one
“ wadsetter, and twenty-four life-renters ;” (that
is, five-and-twenty. Upon that I would observe,
there is no doubt in the world that the contempo-
raneous creation of votes, and the number of
votes contemporaneously created, are circum-
stances of evidence to be attended to. In the pre-
sent case we have nine, in the case of the Duke of
Gordon there were twenty-five :) “ In consequence
“ of an equal number of dispositions and assigna-
“ tions, all dated in one day, the 26th of Sept.
“ 1786, and of as many instruments of seisin, all
“ dated in like manner, the 27th, and registered
“ the 29th of the same month,” (there is, indeed,
a similarity in the cases, in respect of the dates
of the instruments.) “ The whole of these pre-
“ tended titles were made by the order, and at the
“ expence, of the Duke of Gordon.”

But in this case, Lord Eglinton is not so libe-
ral, and he has found more disinterested adhe-
rents. For they have given large considerations
for their purchases, and it is not alleged in the
case that they have not substantially parted with
the money. If it were fit for judicial minds to
entertain suspicion, there might be ground for a
surmise that the money which passed, was like a
sensation that it passed from the hands of the
grantee to the hands of the grantor, and back
again from the hands of the grantor to the hands
of the grantee. But allegations of such a nature
cannot be entertained without proof, nor can it be
presumed, in the absence of proof, that this gen-
tleman, the physician, and several others, who had

no more connexion with the Earl of Eglinton than the most indifferent persons or mere strangers, have thought proper, in order to become his creatures, and to vote as he pleased, each of them to put into his pocket a hundred pounds, or thereabouts. There is no contract to redispone that money, a circumstance which becomes extremely material.

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If a proposition were made to give me an indifferent vote, provided I would send the proposer a certain sum of money, and in a country where it is expressly admitted, that if it be absolute gift, without a money consideration, it is a good vote; can it be requisite, that I, as a purchaser, should reject an independent vote, because it is offered at a low price. Must I insist on paying a larger price than the owner demands for his vote. It is possible I may be taking from him, as matter of sale, that which is intended as matter of gratuity; but surely it is contrary to the settled rule of legal presumption, to hold that, because the surrender is made in that shape, therefore, it must be a case *ubi aliud agitur, aliud simulato concipitur*. Those who make the allegation, must prove it; they cannot shut out the evidence, whether the fact be of the one nature or of the other. In the case of the Duke of Gordon, the whole affair was transacted at his own expence. He had not the least consideration for any of the estates conveyed, some of the alienees being asked previously, whether they would accept of a qualification. The deeds, when engrossed at Edinburgh, were blank, in the names of the grantees, and remained so till sealed at Gordon Castle.

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After this, a very remarkable circumstance happened. It suited the purpose of the Duke of Gordon, to tender these votes when at the Freeholders' Court in Aberdeen ; but it suited likewise the ideas of the agent of the Duke of Gordon, without any communication with any one of these voters, whose claims had been improperly put upon the roll, (as it was said,) to withdraw the whole five-and-twenty of them ; and then in the subsequent year, without any authority from any of these claimants, except two, they were brought forward again ; and being brought forward, the freeholders stated, that the qualification upon which Sir John Macpherson, (who was one of them,) claimed to be enrolled as a freeholder of the county, was nominal and fictitious, and created for the sole purpose of enabling him to vote, and that in defraud of the statute of 7 Geo. 2. The majority of freeholders, however, thought proper to admit him to the roll.

In consequence of this, there was an application under the authority of the statutes, summarily to the Court of Session, and various questions were proposed to be put, in order to prove that these votes were nominal and fictitious. The questions, each and every of them, I understand to have been sanctioned as questions which might be put by the Court ; because the Judgment of this House was, that Sir John Macpherson should confess or deny the averments in the pleadings mentioned. The averments in the pleadings mentioned were, " First, that the conveyance " of the lands, contained in the Respondent's " titles, was made without his previous consent,

“ or knowledge, or at least, that the Respondent
 “ was solicited by the noble Duke, from whom he
 “ derived his right, to accept of a freehold qualifi-
 “ cation. Secondly, that the expence of making
 “ out the title deeds was paid by his Grace :” (and
 I need not here state, that matters, which are
 alleged, and not denied, are in Scotch pleadings
 taken as confessed.) “ Thirdly, that these title
 “ deeds were not delivered to the Respondent be-
 “ fore his enrolment, or at any time in his posses-
 “ sion previous thereto. Fourthly, that when he
 “ was informed of the conveyance, or was pre-
 “ vailed upon to accept it, he did not mean or
 “ think himself called upon to defray the expence
 “ of defending his title in the Court, or elsewhere.
 “ Fifthly, that he did, when he accepted the said
 “ conveyance, and still does, consider himself *as in*
 “ *honour bound* to vote for the candidate who may
 “ be patronized by the noble Duke, and to re-
 “ nounce his freehold qualification at his Grace’s
 “ pleasure.” To be sure, if a man was bound in
 honour to vote for the candidate of the Duke,
 and felt that obligation in honour, he could not
 say that he was not bound in honour (to use a
 Scotch phrase) to denude himself of the estate,
 when called upon, in case his views differed from
 those of his patron.

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What did Sir John Macpherson say to these
 averments? (Lord Thurlow anticipated that Sir
 John Macpherson could not support his case by
 the oath required.) Sir John Macpherson stated
 in his pleadings, “ That the estate he had ac-
 “ quired from the noble Duke yielded 16*s.* 8*d.*
 “ a year, and that he had purchased it at a fair

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“and adequate price,” not saying what it was, and “that it was for the express and special purpose of enabling him to vote for a member of parliament.” Now, although he admitted it was for the purpose of enabling him to vote for a member of parliament, yet, if it was a real estate, the decision of this House would not interfere with it solely on that ground. That was his object. Had it not given him that right, he probably would never have acquired it; and were that right taken away, he would care very little what became of the superiority. He nevertheless maintained, and that he might maintain with good effect, “that a life-rent superiority afforded a “good freehold qualification; and that his titles “were not nominal or fictitious, because he was “possessed of every thing they contained.” But the law of Scotland, as declared by the authority of this House, is, that the conveyances are to be not only clear, but sincere.

The Lords of Session found that it was incompetent to put the question to the Respondent, proposed by the complainers; but they did not stop here, for they repelled the objection of nominal and fictitious to the Respondent’s qualification, and therefore dismissed the complaint, assailed the Respondent, and decerned.

In that case, the appeal to this House was on two grounds. First, it was said that the Court ought to have put those questions; but, secondly, that if the Court did not put those questions, the circumstances of the case were sufficient to shew that those estates were nominal and fictitious. Upon the decision in this House, though

Lord Thurlow stated that honorary obligation would destroy the right, he, nevertheless, in the conclusion of what he states, beseeches the House not to come to a hasty conclusion of the matter; that he would wish to know every thing which could be known upon the subject; and instead of deciding on the circumstances of the case as they appeared in the transactions between the Duke of Gordon and those voters, he sent the case back again to examine the parties; and it turned out that he had prophesied very truly. For Sir John Macpherson would not take the oath proposed to be administered, and he refusing to take that oath, his estate was held to be nominal and fictitious. If he had taken the oath, (as I understand Lord Thurlow,) it would then have been reserved for the Court to have considered the effect of his oath; but his silence was deemed a confession, and he was therefore struck off the roll.

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The question, then, I apprehend to be, whether the case of Macpherson is to be taken as an authority for what the Judges of the Court of Session have done in the present cases. It is not my intention to go through all the circumstances of the present cases, and to consider the effect of Lord Eglinton's proposal to create nine voters; his proposing for one Mr. Martin, his agent; and another, Mr. Simpson, the partner of that agent; and for a third, Mr. Crichton, his agent, at Irvine. There is not, in the case of Mr. Martin, evidence that would satisfy me, that his was not a real estate, provided he would deny that which would

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affect his estate ; and looking at all the correspondence that passed with Hugh Crawford, the correspondence that passed with M^r Knight Crawford, through Hugh Crawford, and his whole correspondence ; looking at the correspondence which passed with Geddes, and with M^r Kerrell ; looking at the correspondence which passed with Dr. Donaldson the physician ; looking at that correspondence which I must look at, if I *can consider it as evidence at all*, with infinite caution, I mean the correspondence with Mr. Martin, and through him, Mr. Simpson, and the communication to Mr. Crichton—the agents having possibly very different purposes from those of the Earl, who proposed to sell ; looking at the voluntary increase of price, (which I confess I do not wonder at, in these writers of the signet, and if I were purchasing an independent vote, I had rather have given more for it, than any of those persons had given. You might call that my motive to meet a popular prejudice, or my motive to meet the judicial inferences that would be raised in the House of Lords, as to the motive of the conveyance, because I had not given enough for it ;) yet if the parties sincerely believed that the Earl of Eglinton was offering independent votes, and purchased accordingly, they would not be destroyed by such circumstances. I do not pass over here, the fact that the votes were created out of dormant titles. That acts both ways. The Earl of Eglinton had dormant titles, and it is stated that he had formerly created votes, which he could not support. There is no evidence to the fact : but

taking it to be so; am I to suppose that the Earl of Eglinton, if examined as a witness, would state, that instead of that which he professed to be his purpose; namely, the making independent votes, he had no such purpose; that it was all simulation—am I to suppose, that in a case in which his Lordship acted with the advice of such a man as Mr. Cranstoun, who appears to have been his adviser, aided by persons of considerable professional skill, I mean the writers here spoken of, Mr. Russell, Mr. Anderson, and Mr. Martin, that he who had been foiled in his purpose before, of creating fictitious votes, was really endeavouring, in contradiction to all that was stated by him, in contradiction to all that is stated by those who are dealing with him, and in contradiction to what they voluntarily undertake to swear, wishing to examine him as well as themselves—am I, notwithstanding all these circumstances, to understand, that in this second attempt, he was endeavouring to do the same nugatory thing, which he had formerly attempted, but failed to accomplish.

I do not go through every observation which may be made upon every part of this case, but I say again, that the case of Mr. M'Knight Crawford teaches me to deal with infinite judicial jealousy, with the question how far I am to cut down an estate, which upon the title deeds is clear, and which the parties aver is sincere, as well as clear by inferences and implications, from the acts of other persons. Inferences and implications were raised in the case of Mr. M'Knight

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Crawford, with almost, or quite as much force, as in the case of these Respondents. But all these inferences and implications were proved to be unfounded, even in the judgment of the Court of Session in Scotland.

We are here upon an infinitely delicate subject. I agree the objection is founded, if the estate can be shown from circumstances, from the refusal of the party to be examined upon interrogatories, or from his deficient answer to those interrogatories, to be an estate not given to him for his own use and benefit, to be used by him as he shall think proper. But I follow Lord Thurlow in opinion, that if the grantee shall, from the obligation of gratitude, act in the same interest as his friend the grantor, that is no objection. Where a father gives to his son a qualification; where an uncle gives to his nephew a qualification; where a brother gives to a brother a qualification; it is very difficult to suppose that the qualification is given by the father, uncle, or brother, without conceiving that, in the one instance, filial affection, and in the other instances, the affections resulting from those relationships, will induce the party to vote in the same interest, with his relative and patron. But authorities cited in argument prove that there must be something further; that you must make out that there is this understanding between the parties. How far that rule is to be carried, is a consideration which led me to submit to this House, in the case of *Fleming v. Drummond*,* the

* June 25, and July 11, 1810. D. P. July 23, 1811. Bell, p. 303.

propriety of remitting the case to the Court of Session ; and I expressed a very strong wish, that, if they sustained their first opinion, they would do that which they have often done most usefully to the King's subjects, embody, in their decision, the reasons for that decision.

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It is my purpose to propose that this case should be remitted, very much in the terms in which that case of *Fleming v. Drummond*, was remitted. If the Court of Session shall be of opinion, after the examination, that they cannot come to the same conclusion as in the case of *M^r Knight Crawford*, I again respectfully express to them my wish, that they would embody in their interlocutor the reason upon which they proceed. The authority of this Court, as established in *Macpherson's case*, must not be shaken. To the extent of that case, the law is settled ; but the doctrine, if pressed beyond that authority, may be attended with grievous consequence. Suppose I have a whole fee which I could contrive to vest in the noble Lord who sits near me, and he might create out of that a dozen votes ; if I should happen to say, I know your political principles ; we have gone through life's journey together, acting very much in the same way with respect to what we conceived to be the public interest, and I had rather you should have that estate for 5,000*l.* than some men, whose private character I revere, and whose conduct I estimate very highly, for double the money : will it be said, because I make a foolish pecuniary bargain, (if that is the real case,) and I am at liberty in this view to make the hypothesis—that my impru-

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dence, caprice, or policy, is to destroy the estate thus created? and this may be diversified in a number of modes. Upon the whole, therefore, I cannot come to such a conclusion as Lord Thurlow contemplated, in the case of M'Pherson; namely, that these estates were intended, between the Earl of Eglinton and these grantees, to be at the use and disposition of the Earl of Eglinton; or that the case, as it now stands before me, affords circumstances sufficient *fairly and roundly to raise that presumption in an unanswerable degree*. I should have said exactly the same, if the case of M'Knight Crawford had come here before it had been reviewed in the Court of Session, and before they had been convinced that their presumption was not raised in an unanswerable degree. Nor can I go to the length of saying, after what I have seen, in *Fleming v. Drummond*, and what I have seen in this case, that the circumstances do fairly and roundly raise a presumption in such a manner, that these parties cannot satisfactorily answer it. If I am right in saying the circumstances fall short of producing that degree of presumption, I conceive I have the authority of this House for saying, that they fall short of that ground, on which this House can be called upon to support the judgment, and that it is our duty to send it back again to the Court of Session, for revision, with liberty to examine the parties as in that case. If they shall be finally of opinion that these estates were nominal and fictitious, I again respectfully intimate my entreaty that they would state the grounds upon which they come to that finding.

With these observations, I purpose, after the

drawing out an order, something in the terms of that made in the former case of *Fleming v. Drummond*, to send this case back again to the Court of Session to be reviewed, and to examine the parties on interrogatories, in the four last appeals. But the final judgment in the case of *Mr. M'Knight Crawford* must be affirmed.

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In each of the four last appeals the following order was made :

“ *Die Jovis, 11^o Februarii, 1819.*

“ Ordered and adjudged, that the cause be re-
 “ mitted back to the Court of Session in Scotland
 “ to hear parties further thereupon, with liberty to
 “ receive such new allegations as the occasion may
 “ require, and with liberty for the Appellant to
 “ confess or deny such averments as to the alleged
 “ nominality, as the Respondents, by interroga-
 “ tories, according to the course of the Court,
 “ shall call upon him to confess or deny : And it
 “ is further ordered, that the Court do review the
 “ interlocutors appealed from, and determine,
 “ whether it is sufficiently established, that the
 “ freeholders of the County of Renfrew did right
 “ in refusing to admit the Appellant upon the
 “ roll, and also do determine, whether such fact
 “ shall be sufficiently established by what hath
 “ already been made to appear to the said Court,
 “ together with any such evidence or proof, as
 “ may be received or made, under such liberties
 “ as aforesaid.”

APPENDIX.

No. I. First Letter sent by the Earl of Eglinton, to the Persons whom he had selected as the Holders of his Freeholds.

Eglinton Castle, 2d February,
1815.

DEAR SIR,

Being determined to bring forward and dispose of some dormant freeholds in the county of Renfrew, I must naturally apply to those gentlemen who I consider my friends, and whom I already consider myself under obligations to. The plan I propose, after mature consideration and consultation with the first counsel at the bar, is as follows:—

That I am to convey the superiority of my own property lands to afford a freehold qualification in life-rent, with a feu-duty payable by me to the life-renter of 5*l*. sterling yearly. The price I receive will be the value of 5*l*. sterling upon the life of the person to whom this conveyance is made, conform to the most approved tables of annuities.

Should it be more agreeable to you to have a larger sum of feu-duty paid, (although it can make no difference to the title, and therefore appears quite unnecessary,) be so good as inform me what extent you would wish it, and I will take it into consideration. To save you trouble I herewith enclose a table for calculating the value of these freeholds.

(Signed) EGLINTON.

This letter was sent to the following Claimants, or their agents, viz.

1. Hugh Crawford, writer in Greenock.
2. By Hugh Crawford to William M'Knight Crawford of Cartsburn.

3. Humphrey Graham, W. S.

4. Francis Martin, writer, Paisley.

5. By him communicated to Alexander H. Simpson, his partner.

6. Fulton M'Kerrel, manufacturer, Paisley, and by him to his brother, John M'Kerrell, manufacturer there. John M'Kerrell is one of the Complainers; but Fulton M'Kerrell gave up his freehold, in order to make way for William M'Knight Crawford.

7. John Geddes, of the Verreville glass-works, Glasgow.

8. Communicated verbally to James Crichton, writer, Irvine, who, as his Lordship's agent at Irvine, corresponded with the other Complainers.

9. Communicated verbally to Dr. William Donaldson, physician in Ayr, as appears from a subsequent letter to him.

No. II. Second Circular, sent as above, and intitled on the back, " Lord Eglinton to the
" different purchasers of Renfrewshire free-
" holds, relative to the additional sum pro-
" posed by Mr. Russell, W. S."

Eglinton Castle, 20th February,
1815.

DEAR SIR,

I have received a letter from Mr. Russell, with respect to the superiorities in Renfrewshire, which I am disposing of. He observes, " that although the superiorities are
" meant to be disposed of for a price, without trust or con-
" fidence, yet it may be right, in order to meet the popu-
" lar prejudice, not to confine the price to the precise va-
" lue of the life interest in the feu-duty. But to add
" something to it, as for the freehold, such as from 20*l.* or
" 30*l.* to 50*l.* on each freehold." He likewise recommends, that the purchasers' own agents prepare the dispositions in their favour, and complete their title by infestment.

If either of these sums should be agreeable to you, to

add to what was mentioned formerly, a copy of the proper disposition will be sent by Mr. Martin, that you may give directions to your agents to extend it accordingly. I remain, dear Sir, your's faithfully,

(Signed) EGLINTON.

P. S. The same idea as mentioned by Mr. Russell had occurred to my friend, Mr. Humphrey Graham, W. S. who is a purchaser, and requested, that instead of paying the sum corresponding to his age in the table, which was 75*l.* that it should be made 100*l.*

Copies of the above wrote to the following gentlemen :—
Colonel Geddes, Verreville, Glasgow : John M'Kerrell, Esq. Paisley ; Hugh Crawford, writer, Greenock ; Dr. Donaldson, Ayr.

CRAWFORD AND MR. HUGH CRAWFORD.

No. III. Excerpt from Letter, Lord Eglinton to Hugh Crawford, Esquire, Writer in Greenock.

27th January, 1815.

After a long paragraph on a separate and private matter, his Lordship writes as to the freehold thus :—

I hope in a short time now to have my dormant freeholds in your county brought forward, and will be happy that you should have one of them. I believe you understand the footing on which they are to be sold,—for the life of the purchaser ; and as to the sum to be paid, five pounds or fifty will make the freehold equally good. Will you have the goodness to write me on the subject ? and hope you will have the goodness to purchase one of them. Few men will be more agreeable to me, being grateful for the friendly support I have received from you. I remain, &c.

No. IV. Excerpt from Letter, Mr. H. Crawford to Lord Eglinton.

[Produced by Lord Eglinton.]

My Lord,

Greenock, January 1815.

I feel very much honoured and obliged by your Lordship's polite information respecting the division of your Lordship's freeholds in this county, and I shall be most happy to become a purchaser of one of these life-rents, so soon as your Lordship shall have made the arrangements, and fixed a price. I have the honour to be, &c.

(Signed) HUGH CRAWFORD.

The Right Hon.
Earl of Eglinton, &c.

No. V. Hugh Crawford, Esquire, to Lord Eglinton.

Greenock, 9th February,
1815.

My Lord,

During my absence in Edinburgh, where I have been for a week, your Lordship's favour of the 2d arrived, containing the scheme upon which your Lordship is inclined to dispose of some freeholds in this country. I have attentively considered the scheme, and, in so far as I can judge, it has my hearty approbation. I beg leave, therefore, to mention that I shall readily become a life-rent purchaser from your Lordship of one of these freeholds. My age is between 52 and 54, so that I shall fall under the class of 56*l.* 7*s.*, and the money will be paid whenever, and in any manner, your Lordship may be pleased to signify. My friend, Mr. Crawford of Cartsburn, is very desirous of purchasing 180*l.* of valuation to join to his own extent, which is so much defective; but if that cannot be obtained, he will purchase a complete freehold, and upon the terms that your Lordship has pre-

scribed. May I be permitted to recommend Mr. Crawford to your Lordship's notice? I again beg leave to offer your Lordship my most respectful acknowledgments, for the repeated kindnesses which your Lordship has shown to me; and remain,

(Signed) HUGH CRAWFORD.

To the Right Hon.
the Earl of Eglinton, &c.

No. VI. Lord Eglinton to Hugh Crawford,
Esq.

Eglinton Castle, 11th February,

DEAR SIR,

1815.

I have to acknowledge the receipt of your letter of the 9th inst., and am glad that you are to become a purchaser of one of the freeholds.

It would have given me pleasure that I had it in my power to have accommodated your friend, Mr. Crawford of Cartsburn, by the valuation he wants, to make out a freehold, but I have it not. I will be happy, therefore, that he will purchase one of those on the terms I have been advised to propose; and, as you mention, that he will accept, I have wrote Mr. Martin to transmit his name to Mr. Russell, at Edinburgh, for that purpose, and I hope it is not yet too late. I shall be proud to have two such respectable purchasers as he and you. I have wrote Mr. Martin, therefore, in case the number is filled up, if possible to give a preference to Mr. Crawford, in the room of some other. Excuse this hurried note. I am, &c.

(Signed) EGLINTON.

Hugh Crawford, Esq.
Writer, Greenock.

P. S. I will be most happy to be honoured with the acquaintance of Mr. Crawford, and if you will be so good as to endeavour to prevail upon him to pay me a visit, and show him the way here, it will give me very great pleasure.

No. VII. Lord Eglinton to Mr. Martin.

(Private.)

SIR,

February 11, 1815.

In a letter which I have just received from Mr. Crawford of Greenock, he mentions that Mr. Crawford of Cartsburn is willing to purchase one of my votes. He, therefore, *privately*, is much more agreeable to me than young Mr. Robertson, who I wrote you of, yesterday. I beg, therefore, his name may be forwarded to Mr. Russell, which completes the number, being eight. I have time to add no more, but remain, &c.

(Signed) EGLINTON.

No. VIII. Hugh Crawford to William M^cKnight Crawford.Greenock, 13th February,
1815.

MY DEAR FRIEND,

I lost no time, upon my return, in writing to the Peer of Eglinton, and last night's post brought me a letter from his Lordship, which I now beg to transcribe :—

[Here Lord Eglinton's letter to Hugh Crawford, of 11th February, 1815, already printed No. VI. is inserted.]

This, you will say, is civil enough, and I hope soon to advise you that there is yet one open for your honour.

I trust that, in the course of this season, you will be able to run down the length of the Castle, taking another castle in your way.—I am, &c. ever yours affectionately,

(Signed) HUGH CRAWFORD.

No. IX. Lord Eglinton to Hugh Crawford.

Eglinton Castle, 12th February,
1815.

DEAR SIR,

Since writing you, I had received a letter from Mr. Fulton M^cKerrell, accepting of the terms offered for the purchase

of one of the freeholds. He had made an application formerly upon the subject, but as I had not received an answer, I concluded that the terms were not agreeable to him. From his letter, however, I find that he has been from home, and as his application was prior, I am afraid he must be preferred. Perhaps, however, I may have an after one to offer to Mr. Crawford, which I will be happy to do. In the mean time, I hope that will not prevent me from having the pleasure of seeing you and him here, and to be honoured with his acquaintance. I remain, dear Sir, &c. (Signed) EGLINTON.

Hugh Crawford, Esq.
Writer, Greenock.

No. X. Mr. Hugh Crawford to Mr. M^cKnight
Crawford.

Greenock, 14th February,
1815.

MY DEAR SIR,

Since writing yesterday, I last night had another letter from the Earl of Eglinton, dated the 12th, of which the following is a copy :—

[Here Lord Eglinton's Letter of 12th February, No. IX.
is inserted.]

I confess much disappointment at this last letter, as I really concluded that all was fixed. Before making any reply to these letters, I request to hear from you, and may I beg of you to do so on receipt, &c.

(Signed) HUGH CRAWFORD.

William M^cKnight
Crawford, Esq.

No. XI. Mr. M^cKnight Crawford to Hugh Crawford, Esq.

MY DEAR SIR,

15th February, 1815.

I know no particular answer that can be given to the Peer's letter, but that I regret my application had not been

made sooner. If a sum of valuation to make up my title could be had at a reasonable expence (my own writings included), it would require only about 180*l.* Scots. Thank the Earl in my name for his wishes to serve me.

(Signed) W. M'KNIGHT CRAWFORD.

Hugh Crawford, Esq.

Writer, Greenock.

No. XII. H. Crawford, Esq. to Lord Eglinton.

Greenock, February 22,
1815.

MY LORD,

On my return last night from the interment of Mrs Crichton, I found your Lordship's favour of the 20th. The suggestion of Mr. Russell, I presume, is very proper, and I have no objection whatever to make a corresponding advance in the same way as Mr. Graham has done.

My class is that falling under the purchase of 56*l.* 7*s.* ; so that if Mr. Graham (whose class is 75*l.*) advances 25*l.* mine will be in proportion. When convenient for your Lordship, you can direct Mr. Russell to correspond with my agent, Mr. Horne, W. S., who between them will do all matters properly. I regret very much that I had not the honour of paying my respects to your Lordship yesterday, as I returned home immediately after the interment. I have, &c.

(Signed)

HUGH CRAWFORD.

The Right Hon.

the Earl of Eglinton, &c.

No. XIII. The Earl of Eglinton to Hugh Crawford, Esq.

Eglinton Castle, 25th February,
1815.

DEAR SIR,

Mr. Martin is just now with me, and I find that I have still another freehold to dispose of in the county of Ren-

frew, upon the estate of Eastwood, which I am glad to have it in my power to offer to your friend, Mr. Crawford. If he will have the goodness to accept, I beg you will write to Messrs. Russell, Anderson, and Tod, mentioning his Christian name and age, without delay, in the hope that his disposition may be made out, along with the others, which I have given positive directions to be immediately completed. I will be glad to hear from you. Excuse this hurried letter, and believe me to be, &c.

(Signed) EGLINTON,

Hugh Crawford, Esq.
Writer, Greenock.

No. XIV. Hugh Crawford to Lord Eglinton.

Greenock, February 27,
1815.

MY LORD,

I am this morning honoured by your Lordship's letter of the 25th, and have by this post transmitted a copy of it to Mr. Crawford, with a request that he may, with the least possible delay, inform Messrs. Anderson, Russell, and Tod, of his resolution. His residence (Ratho) is within seven miles of Edinburgh, and I trust my letter will find Mr. Crawford at home, in which case he will tomorrow write to, or wait on these gentlemen, and I shall not fail to communicate his answer to your Lordship.

I again beg your Lordship to accept my grateful acknowledgments for these repeated marks of attention; and I remain, with the greatest respect, &c.

(Signed) HUGH CRAWFORD.

[N. B. The letter to Mr. M'Knight Crawford, referred to in the above, was not produced.]

No. XV. Hugh Crawford to Messrs. J. and
D. Hornes and Easton, W. S.

Greenock, 4th March,

DEAR SIRS,

1815.

I have purchased from the Earl of Eglinton one of his Lordship's life-rent freeholds in the county of Renfrew, and he has suggested that my agents should draw the conveyance, and for this purpose it will be necessary that a meeting be had with the Earl's men of business, Messrs Anderson, Russell, and Tod, W. S.

Will you have the goodness immediately to see these gentlemen, and have all matters properly fixed. I am, &c.

(Signed) HUGH CRAWFORD.

Messrs. J. and D. Hornes
and Easton, W. S.

No. XVI. Messrs. Hornes and Easton, W. S.
to Hugh Crawford, Esquire, Writer, Greenock.

DEAR SIR,

6th March, 1815.

In consequence of your letter of the 4th received yesterday, we, to-day, waited on Messrs. Russell, Anderson, and Tod, the agents for the Earl of Eglinton, to receive the titles, and arrange respecting the conveyance of the freehold purchased by you from His Lordship; but we were told that the terms had not yet been agreed on between Mr. Martin of Paisley and you, and that nothing could be done here until that should take place. The only things we understood you had to fix were, the price and the feu-duty. When they heard of that being done, they were to let us know, and we shall of course lose no time in getting the conveyance prepared.

(Signed) J. and D. HORNES and EASTON.

To Hugh Crawford, Esq.
Writer, Greenock.

No. XVII. Mr. Francis Martin, Writer, Paisley,
to Hugh Crawford, Esq.

DEAR SIR,

7th March, 1815.

I inclose you a draft of a life-rent disposition by Lord Eglinton to you.

There is a blank left for the price. You can fill it up with any sum from 50*l.* upwards. The sum you insert regulates the feu-duty. You'll observe that twenty guineas is to be included for the value of the vote.

I request, after you have perused the draft and filled up the blank article, that you will send the deed to your agent, Mr. Horne, who will deliver it to Mr. Russell, W. S., that the description of the lands may be inserted ; after which Mr. Horne will extend it, and then Mr. Russell will transmit the extended deed to be signed by his Lordship. I beg you'll get this done *as expeditiously as possible*. I am, &c.

(Signed) FRA. MARTIN.

Hugh Crawford, Esq.
Writer, Greenock.

No. XVIII. Mr. Crawford to Messrs. Hornes
and Easton.

Greenock, 8th March,
1815.

DEAR SIRS,

Prefixed you have copy of a letter received last night from Mr. Martin, and inclosed you have draft of the disposition which (agreeably to the table of the annuities and usage, I have inserted 56*l.* 7*s.*), as there is an immediate necessity for the business being arranged, I request you may, on receipt, wait on Mr. Anderson, and get the whole completed. I am, &c.

(Signed) HUGH CRAWFORD.

Messrs. J. and D. Hornes
and Easton, W. S.

No. XIX. Hugh Tod to James Horne.

DEAR SIR,

59, George Street,
11th March, 1815.

We have been favoured with your letter of the 9th instant, inclosing draft of a disposition by Lord Eglinton to Mr. H. Crawford, of the superiority, in life-rent, of certain lands in Renfrewshire, which, however, we delay revising, until the feu-right necessary for creating the vassalage shall be framed and completed. To enable us to do this, will you have the goodness to let me know, by the bearer, the feu-duty which Mr. Crawford has agreed to pay? I am, &c. for Messrs. Russell, Anderson, and Tod.

(Signed) HUGH TOD.

James Horne, Esq.

No. XX. Hugh Crawford to Messrs. Hornes and Easton.

Greenock, 15th March,
1815.

DEAR SIRS,

From your unusual silence of late, the writer of this is necessitated to refresh your memories, requesting you would, with your earliest conveniency, write him on the following cases, the life-rent freehold from the Earl of Eglinton. I am, &c.

(Signed) HUGH CRAWFORD.

Messrs. J. and D. Hornes
and Easton, W. S.

No. XXI. H. Tod to Messrs. Hornes and Easton.

59, George Street, March 23,
1815.

DEAR SIR,

I return you revised the draft of the disposition by Lord Eglinton, to Mr. Hugh Crawford, of the superiority

in Renfrewshire, and shall be glad if you can get it extended, and sent me to-morrow, in time to admit of its going west by the post of that evening. I am, gentlemen,

(Signed) H. TOD.

Messrs. Hornes and Easton,
W. S.

No. XXII. Messrs. Hornes and Easton to
Messrs. Russell, Anderson, and Tod.

24th March 1815.

We were this morning favoured with your letter of yesterday, returning the draft of the life-rent disposition, by the Earl of Eglinton to Mr. Crawford, revised, and we now, agreeable to your wishes, send it to you extended, that you may forward it by this night's post to his Lordship, for execution.

We presume the price is to be paid to you, and we shall be accordingly ready to do so. We are, &c.

(Signed) J. and D. HORNES and EASTON.

Messrs. Russell, Anderson,
and Tod.

No. XXIII. Messrs. Hornes and Easton to Hugh
Crawford, Esq. Writer, Greenock.

17 Heriot Row, 24th March, 1815.

We have now sent Messrs. Russell, Anderson, and Tod, the extended disposition, by the Earl of Eglinton, to you, to be forwarded to his Lordship for execution. We presume we should pay the price of the freehold to Messrs. Russell, Anderson, and Tod, when they return the disposition to us, signed, and we shall accordingly do so, unless we hear from you that it is to be settled otherwise. We are, &c.

(Signed) J. and D. HORNES and EASTON.

Hugh Crawford, Esq.
Writer, Greenock.

No. XXIV. Mr. Hugh Crawford to Messrs.
Hornes and Easton, W. S.

DEAR SIRs,

March 25, 1815.

I have been favoured with yours of yesterday. I am at a loss to say whether I am to remit Lord Eglinton the price, or pay it to his agents, Messrs. Russell, Anderson, and Tod; and upon the whole, I think you had better offer it to these gentlemen when you receive the titles, and draw on me through the Bank of Scotland.

(Signed) HUGH CRAWFORD.

J. and D. Hornes and Easton,
Esquires, W. S.

No. XXV. Hugh Tod, Esq. to Messrs. Hornes
and Easton, W. S.

DEAR SIRs,

59 George Street,

6th April, 1815.

I have received back the disposition by Lord Eglinton to Mr. Crawford, signed by his Lordship; and as you mentioned that you would be prepared to pay the price, I hope it will be convenient for you to settle to-morrow. If, however, you are anxious to get the infestment passed immediately, and are not in funds of Mr. Crawford's to pay the money, I shall, in the mean time, accept of your letter, declaring that it has not been paid, and engaging to do so within 10 days.

The Crown-charter, upon which the infestment must proceed, is in the hands of Mr. Francis Martin, writer in Paisley, who will readily give Mr. Crawford access to it when he wishes for it, for the purpose of getting the infestment passed. I remain, &c.

(Signed) HUGH TOD.

Messrs. Hornes and Easton,
W. S.

No. XXVI. Messrs. Hornes and Easton to H.
Crawford, Esq.

Heriot Row, 7th April,
1815.

We have now settled with Messrs. Russell, Anderson, and Tod, for your Renfrewshire freehold, and received the disposition, which we shall inclose. In the course of a day or two, we may value on you for a sum nearly equal to the price, being 56*l.* 7*s.* Should you wish us to prepare a draft of the infestment, or to look at any draft you may prepare, we shall be happy to do so. The Crown-charter is with Mr. Martin, who will lend it to you for this purpose. We are, &c.

(Signed) J. and D. HORNES and EASTON.

Hugh Crawford, Esq. Writer,
Greenock.

No. XXVII. Excerpt of Letter from Messrs.
Hornes and Easton, W. S. to Hugh Crawford
and Son.

DEAR SIR.

8th April, 1815.

We have now settled with Messrs. Russell, Anderson, and Tod, for your Renfrewshire freehold, and received the disposition, which we shall inclose. In the course of a day or two we may value on you for a sum nearly equal to the price, being 56*l.* 7*s.*

Should you want us to prepare a draft of the infestment, or to look at any draft thereof you may prepare, we shall be happy to do so. The Crown-charter is with Mr. Martin, who will lend it to you for this purpose, in which there should be no delay. And we are, &c.

No. XXVIII. Hugh Crawford, Esq. to Francis
Martin, Esq.

Greenock, 10th April, 1815.

DEAR SIR,

Inclosed I beg leave to hand you disposition in life-rent by the Earl of Eglinton in my favour, and as I presume you will have occasion to be in Eaglesham, on a similar business, I beg you may then get me infest also, and the sooner this may be accomplished the better.

Before extending the sasine, I beg you may submit the scroll to Messrs. Hornes and Easton, 17, Heriot Row, Edinburgh. I am, &c.

(Signed) HUGH CRAWFORD.

No. XXIX. F. Martin, Esq. to Hugh Crawford,
Esq.

DEAR SIR,

Paisley, 10th April, 1815.

I received yours this afternoon. I am to be at Eaglesham on Friday morning, and will then pass your infestment, along with some others, and shall afterwards send the draft to be revised as you desire. I am, &c.

(Signed) FRA. MARTIN.

Hugh Crawford, Esq. Writer,
Greenock.

Have you given orders for Cartsburn's disposition being extended *as it stands*, agreeable to the Earl's wish?

No. XXX. Hugh Crawford, Esq. to John
Dillon, Esq.

Greenock, 14th March, 1814.

DEAR SIR,

Our friend Mr. M. Crawford having completed the purchase of a freehold (life-rent) in this county from the Earl

of Eglinton, his agent, Mr. Martin, of Paisley, is very solicitous that the business be immediately completed.

It falls to you, as Mr. Crawford's man of business, to draw the disposition, and Mr. Crawford having by this post written to you to that effect, he has desired me to state to you, under what class in the scheme of valuations of lives Mr. Crawford falls. His age, between 29 and 30, makes the value of his life 74*l.* 9*s.*; will you therefore *immediately* wait on Messrs. Russell and Anderson, (the agents for the Earl,) and peruse the draft of the disposition, which can be filled up with the above sum, and then get it extended, so as no time may be lost in obtaining the Earl's signature, and afterwards Mr. Martin expedes all the infestments on the same day. I believe Mr. Anderson has Mr. C.'s name and designation; if not, you can give it, designing him *younger of Crawfordsburn*. I am, &c.

(Signed)

HUGH CRAWFORD.

John Dillon, Esq. Writer.

No. XXXI. Mr. M'K. Crawford to Lord Eglinton.

Cartsburn by Greenock,
4th March, 1815.

MY LORD,

Mr. Hugh Crawford hast just informed me that your Lordship has still a freehold in this country to dispose of, and that you was willing to let me have it. I shall be very happy to become the purchaser; and I have directed Mr. Crawford to write to your Lordship's man of business on that subject. I regret very much that owing to the shortness of my stay in this part of the country it is out of my power to accept of your invitation of being at Eglinton; and in the mean time, &c.

No. XXXII. Mr. Dillon to Mr. Hugh Crawford.

DEAR SIR,

March 15, 1815.

I have your letter of yesterday, and called upon Russell, Anderson, and Tod, when I saw the latter, who tells me he has the papers ready for signing by Lord Eglinton, which create a feu-right, previous to conveying the superiority; these, he said, he was to get signed to-day by Lord Eglinton, who is in town; after which they will be sent west for infestment. The one for Mr. C. contains a feu-duty of 5*l.* to be conveyed to him for his life, the value of which he desired me to calculate, which we have to pay, along with 21*l.* for the vote. I mentioned to him your calculation of 74*l.* 9*s.* which I suppose is the value of 5*l.* a year for the probable term of Mr. C.'s life. Please mention to me the number of years, and according to what table it is taken, that I may adjust the calculation to their mind. When the feu-right is completed by infestment, I will get from them the materials for a disposition to the superiority. I am, &c.

No. XXXIII. Hugh Crawford, Esq. to John Dillon, Esq.

Greenock, 17th March,
1815.

DEAR SIR,

Yesterday I had your favour of 15th, and, in answer, I beg to inclose you copy of the Earl's letter to me, with the schedule of the lives, which after having made your own use of, you can return to me. Mr. Crawford's age is thirty, so that you can be at no loss to fix the sum. I am, &c.

(Signed) HUGH CRAWFORD.

Mr. John Dillon,
Writer,

[In the above letter was inclosed a copy of Lord Eglinton's circular letter to his voters.]

No. XXXIV. Mr. Hugh Tod, W. S. to Mr.
John Dillon, Writer, Edinburgh.

59, George Street,
23d March, 1815.

DEAR SIR,

I return you revised the draft of the disposition by Lord Eglinton to Mr. M'Knight Crawford of the superiority in Renfrewshire, and should be glad if you could get it extended and sent to me in time to-morrow, to admit of its going west by the post of that evening. I am, &c.

(Signed) HUGH TOD.

Mr. John Dillon,
Writer.

No. XXXV. Hugh Crawford, Esq. to John
Dillon, Esq.

Greenock, 11th April,
1815.

DEAR SIR,

Yesterday I forwarded my life-rent disposition from the Earl of Eglinton to Francis Martin, writer, Paisley, in order that he might expedite my infestment. This morning I have a letter from him, acknowledging the receipt of that deed, and saying that he would be at Eaglesham on Friday, and then pass my infestment, along with some others. He then adds,—“ Have you given orders for Cartsburn's disposition being extended *as it stands*, agreeable to the Earl's wish ? ” As I am unable to answer that query, and as the sooner Mr. Crawford is infest the better, I request you may get the disposition expedite, with the least possible delay. I have written to Mr. Martin to the above effect. I am, &c.

(Signed) H. CRAWFORD.

No. XXXVI. John Dillon, Esq. to Hugh Crawford, Esq.

Edinburgh, 12th April,
1815.

DEAR SIR,

I have your letter of yesterday. Mr. Crawford's disposition has been extended, signed, and delivered. On inquiry where I was to get the charter to expedite the infestment, Mr. Tod told me that it was lodged with Mr. Martin, in order that his Lordship's disponees might have access to it for that purpose. Accordingly, I yesterday dispatched the disposition, and a draft of the sasine, to Mr. Knox, with instructions, without delay, to get Mr. C. infest, and, for that purpose, to apply to Mr. Martin for the charter. Perhaps they may go together to the ground, and do the business at the same time. I am, &c.

(Signed) JOHN DILLON.

Mr. Hugh Crawford,
Writer, Greenock.LETTERS RELATING TO THE CASE OF
HUMPHREY GRAHAM.No. XXXVII. Lord Eglinton to H. Graham,
W. S.Eglinton Castle, February 2,
1815.

DEAR SIR,

There are several dormant freeholds on my estate in Renfrewshire, which I want to dispose of to my particular friends, on the footing mentioned in the inclosed letter. If your father or you will have the goodness to purchase one of them, it will add to the favour and friendly attachment I have already received from you. There can be no doubt that these freeholds are unchallengable, and as in-

dependent as any in the kingdom, but of this you will be a perfect good judge yourself. I remain, &c.

(Signed) EGLINTON.

[This letter contained the general circular of 2d of February, 1815, No. I.]

No. XXXVIII. H. Graham, W. S. to Lord Eglinton.

Edinburgh, 6th February,

MY LORD,

1815.

Allow me to return your Lordship my most grateful thanks for the very polite offer of a life-rent freehold in Renfrewshire, contained in your letter of the 2d current. A purchase of this nature would not suit my father so well,—but as I have every desire to become a voter in that county, *if your Lordship will be so good as put a value on the life-rent qualification, as well as on the feu-duty*, I shall be happy to become a purchaser. The value of the annuity seems accurately calculated according to the government tables,—and a vote purchased in this manner must undoubtedly be as good as any in the kingdom. I have the honour to be, &c.

(Signed) HUMPHREY GRAHAM.

No. XXXIX. James Crichton, Writer, Irvine, Factor for Lord Eglinton, to H. Graham, W. S.

SIR,

Irvine, 9th Feb. 1815.

I am desired by the Earl of Eglinton to explain to you the value of the life-rent freeholds mentioned in his Lordship's letter to you of 2d inst. in answer to your letter of 6th.

You request, in that letter, the Earl to put a value on

the freehold. The value of the feu-duty being in the nature of an annuity on the life of the purchaser, you will find, according to the age, by the table sent, and this value is meant to be the price of that *feu-duty*, and *freehold* thereby given.

If this be satisfactory to you, you will have the goodness to mention it to Mr. Russell, who will make out the deed in your favours, and it will be obliging your dropping me a few lines, saying you have done so. I am, &c.

(Signed) JAMES CRICHTON.

No. XL. Mr. Graham's Answer to the above Letter from Mr. Crichton.

Edinburgh, 11th February,
1815.

SIR,

I have, to-day, been favoured with yours of the 9th current. I was aware of Lord Eglinton's goodness in intending the qualification should be included in the price of the annuity. But as it undoubtedly possesses a value over and above whatever may be that of the annuity, I should wish to give what may be considered a fair price for it also. Say, therefore, that both together may be worth 100*l*. If this price be approved of, I shall apply^d immediately to Mr. Russel, so that the necessary deeds may be prepared as soon as possible. I remain, &c.

(Signed) HUMPHREY GRAHAM.

No. XLI. James Crichton, Esq. to H. Graham,
W. S.

SIR,

Irvine, 15th February, 1815.

I am favoured with yours of the 11th current, and have to observe, that though the sum only in the table sent you is exacted as the price of the annuity and freehold, and is calculated on Price's tables of annuities, as the value of the 5*l*. only, yet the same sum laid out to the best advantage in purchasing an annuity only, would

yield nearly one half more than the 5*l*. So that the difference may be considered as the value of the freehold. You can arrange the matter to your satisfaction, however, with Mr. Russell,—meantime, I am, &c.

(Signed) JAMES CRICHTON.

No. XLII. Lord Eglinton to H. Graham, W. S.

Eglinton Castle, 15th February,
1815.

DEAR SIR,

My wish is, that the purchase of the freehold may be made entirely to your pleasure. I am happy to have such a purchaser. If you will be so good, therefore, as take the trouble to communicate with Mr. Russell on the subject, the affair will be settled; and I am anxious that dispositions and conveyances may be made out, that the freeholds may be effective as soon as possible. Excuse this hurried note, and I remain, &c.

(Signed) EGLINTON.

No. XLIII. H. Graham, W. S. to George Russell, Esq. W. S.

Edinburgh, 21st February,
1815.

DEAR SIR,

I have, within these few days, had some correspondence with Mr. Crichton at Irvine, relative to my purchasing from Lord Eglinton a life-rent vote in Renfrewshire, with a feu-duty attached of 5*l*. sterling, and I have been referred by him to you, in order to conclude the business. I made offer of 100*l*. for the feu-duty and vote together, of which, perhaps, about one-half may be considered the price of the annuity, as I should conceive myself entitled to not less than 10 *per cent.* on my life, and the remainder to be the value of the vote. If you agree with me in thinking this a fair price, I shall be glad to have it concluded as soon as possible. I remain, &c.

(Signed) HUMPHREY GRAHAM.

No. XLIV. Lord Eglinton to H. Graham, W. S.

Eglinton Castle, 25th February,
1815.

DEAR SIR,

I am so much hurried to-day, that I have only time to say in answer to your letter to Messrs. Russell, Anderson, and Tod, on the purchase of the Renfrewshire freehold, which they sent me, that I heartily agree to its being done in the way you propose. It is my wish that the matter should be made quite agreeable to you and the purchasers, and you are entitled to have it done so. Pray remember me kindly to your father. And I remain, &c.

(Signed) EGLINTON.

No. XLV. George Russell, Esq. W. S. to H.
Graham, W. S.Edinburgh, 27th February,
1815.

DEAR SIR,

I have Lord Eglinton's instructions to accept the offer contained in your letter to me of the 21st instant, and hope soon to be able to send you the necessary papers for completing the transaction. I am, &c.

(Signed) GEORGE RUSSELL.

No. XLVI. Hugh Tod, Esq. W. S. to H. Gra-
ham, W. S.59, George-Street, 23d March,
1815.

DEAR SIR,

We delayed handing you the writs necessary to enable you to prepare the draft of the disposition to the freehold in Renfrewshire, purchased from Lord Eglinton, until a vassalage was completed, and that being now done, I request you will take the earliest opportunity of framing and sending, for our revisal, a draft of the disposition to the superiority, in the terms mentioned in your offer. I

cannot conveniently part with the charter, but it shall be shown to you before the transaction is completed, and, in the mean time, I annex a note of the description of the lands. I shall also satisfy you afterwards, that these extend to the valuation necessary. To save us both some trouble, I send you the draft of a similar disposition, which I beg you will return.

No. XLVII. Hugh Tod, Esq. W. S. to H. Graham, W. S. also dated 59, George Street, 23d March, 1815.

DEAR SIR,

With reference to my letter in the early part of the day, I have now to trouble you with the Crown-charter in favour of Lord Eglinton, among others, of the superiority of the lands which is to be conveyed to you, and also a certificate of the valuation of his Lordship's property lands in the county of Renfrew, both of which I hope you will return me early to-morrow. I am, &c.

(Signed) HUGH TOD.

No. XLVIII. H. Graham, W. S. to Hugh Tod, W. S.

Edinburgh, 24th March,
1815.

DEAR SIR,

I am this morning favoured with yours of the 23d, accompanying the Prince's charter in Lord Eglinton's favour, and certificate of valuation of his Lordship's lands in Renfrewshire. I return you herewith these writings, with the draft disposition you were so good as send me. I have prepared a draft disposition of the freehold purchased by me, which I enclose for your revisal, and shall be glad how soon it be returned to be extended. It will be proper, at the same time, that I see the feu-rights of the lands disposed.

LETTERS RELATING TO THE CASE OF JOHN
M'KERRELL, MANUFACTURER, PAISLEY.

No. XLIX. Fulton M'Kerrell to Lord Eglinton,

MY LORD,

Paisley, 10th February, 1815.

On my return from Ayrshire, where I have been for a few days, I have the honour of receiving your letter of the 2d instant. Permit me to express how sensible I am of the very handsome manner in which you are pleased to offer me a freehold qualification in this county. At the same time I have to state to your Lordship, that when I made application on this subject to Mr. Robertson at Irvine, it was for my brother John M'Kerrell of this place, as well as for myself, and to whom, I am persuaded, you will feel equally friendly disposed. If, therefore, you have not already completed your number, I hope we may both be included. If, however, it should unfortunately prove otherwise, and although I am very anxious for a vote, yet I feel I should not act properly by my brother, considering that I undertook to apply for him at the time I did for myself, if I did not yield the qualification to him. To this arrangement, should it prove inconvenient for you to accommodate us both, I trust you will have no objection. I have noted below my brother's age, as well as my own.

With regard to the sum of feu-duty to be paid, it is perfectly the same to us, and may be made whatever is agreeable to your Lordship. I have the honour to be, &c.

(Signed) FULTON M'KERRELL.

The Right Hon.
the Earl of Eglinton, &c.

[The letter of which M'Kerrell here acknowledges the receipt, is the general circular, 2d February, No. 1.]

John M'Kerrell completed his 56th year Aug. 31, 1814.

Fulton M'Kerrell ditto 45th ditto 17th September, 1814.

No. L. Alexander M'Lean (Lord Eglinton's
Secretary) to Francis Martin.

Eglinton Castle, 11th February,
1815.

SIR,

Lord Eglinton wrote you to-day, requesting that you would transmit Mr. Crawford of Cartsburn's name to Mr. Russell, for a freehold in Renfrewshire. His Lordship has, however, by this night's post, received an answer to his letter to Mr. M'Kerrell, of which I inclose you a copy. His Lordship desires me to say, that he is most anxious, if possible, to accommodate the Mr. M'Kerrells, and requests that you will, in the mean time, delay transmitting Mr. Crawford's name, although he is equally anxious to have him as a purchaser.

Perhaps it may not be an object of much consequence to Mr. Simpson *at this time* to get upon the roll; if he could, therefore, withdraw his claim till the Eastwood votes are made effective, it would, I think, be agreeable to His Lordship. I am, &c.

(Signed) ALEX. M'LEAN, Secretary.

Lord Eglinton will write you himself soon.

Mr. Martin, Writer, Paisley.

No. LI. Lord Eglinton to Francis Martin.

Eglinton Castle, 12th February,
1815.

SIR,

Mr. M'Lean, at my desire, sent you a copy of Mr. M'Kerrell's letter by last night's post. It is very unfortunate that I did not receive this letter sooner, as I should have been anxious to accommodate these two gentlemen, and to have had them for purchasers. I scarcely know what can be done. One of them, however, must have a preference to Mr. Crawford of Cartsburn, and I will write his friend, Mr. Hugh Crawford, on the subject, Mr. M'Kerrell having the undoubted right, from having first

applied. I know no way of accommodating the brothers, but by soliciting either your friend Mr. Simpson, or Mr. Crichton, to resign their claim, and it will be doing me a particular favour, if one or other of them should be good enough to do it. May not another vote afterwards be made out upon Eastwood, which may be given in lieu of the one given up? I have some reason, upon enquiry, to believe that I am superior of John Govan's Mains of Eastwood.

I request your answer as soon as possible. If you have wrote to Mr. Russell, it will be proper that you write him again, that a more correct list will be sent him. I mean to be in Edinburgh myself this day se'nnight, when I will get this and other business arranged. I am, &c.

(Signed) EGLINTON.

Mr. Martin, Writer,
Paisley.

No. LII. Lord Eglinton to Fulton M'Kerrell.

Eglinton Castle, Feb. 18,
1815.

DEAR SIR,

I have a thousand apologies to offer you, for not having answered your letter sooner; but being engaged in some very interesting business, I hope you will accept as my apology.

I very much regret that, from prior engagements, it will not be in my power to give a freehold to your brother. Had I known at first, I would have been most happy to have given a preference to you, to most others on the list.

I hope, when your brother and you come to this country, that you will not pass this house, for, I assure you, nobody will be more happy to see you, or make you more welcome. I am, &c.

(Signed) EGLINTON.

Fulton M'Kerrell, Esq.
Paisley.

No. LIII. Mr. Martin to Lord Eglinton.

MY LORD,

Paisley, 13th Feb. 1815.

I have the honour of your Lordship's different letters respecting the freehold qualifications in this county. It is my intention to be in Edinburgh on Wednesday, where I shall remain for several days, during which I shall be frequently with Mr. Russell, and shall endeavour to bring west with me the dispositions, so far as they can be got finished.

In the list of names which your Lordship has transmitted me, I do not find the *ages* of the several gentlemen; Mr. Russell will of course be unable to fill up the *sums* until this is known. Your Lordship has not signified your pleasure with regard to the feu-duties. I therefore take it for granted that you have fixed upon 5*l.* to go with each vote, in which case the price will be regulated by the age entirely.

With respect to Messrs. M'Kerrells' application, I was quite aware of Mr. Fulton M'Kerrell's intention as to his brother John, and I knew also that he wished for a vote himself; but I fear that *he cannot put his vote in action so long as he holds his present situation of distributor of stamps for the district*. Perhaps he may have some arrangements in view respecting it, but it is right for me to apprise your Lordship of his situation, in case I might be reflected on afterwards.

I shall be happy to have the honour of a letter from your Lordship while I am in Edinburgh, with information as to the particulars above stated, in which case I shall be able to bring the dispositions with me. I have the honour to be, &c.

(Signed) FRA. MARTIN,

LETTERS RELATING TO THE CASE OF MR.
GEDDES.

No. LIV. Lord Eglinton to Colonel Geddes.

Eglinton Castle, February 22,
1815.

DEAR COLONEL,

The enclosed is a circular which I have sent to several of my friends, who appear willing to purchase the freeholds which at present are dormant in your county. When I had the pleasure of seeing you at Eaglesham, you flattered me by saying that you would purchase one of them. I will take it as a particular favour if you will do so. If the footing they are put upon is not agreeable to you, I will be glad to make it in the way most agreeable to you. As it stands at present, it is according to the opinion I had at Edinburgh from Mr. Cranstoun and other professional gentlemen there.

I beg you will accept of my warmest thanks for the many instances of attention and friendship I have received from you, which shall be ever remembered with heartfelt gratitude. Yours, &c.

(Signed) EGLINTON.

[The letter here referred to is the general circular, No. I.]

No. LV. Colonel Geddes to Lord Eglinton.

Verreville, February 3,
1815.

MY DEAR LORD,

I am honoured by your Lordship's obliging communication of the 2d instant, and will readily purchase a life-rent qualification in the county of Renfrew, upon the terms mentioned in your Lordship's letter.

Your Lordship will be so kind as desire the proper deed to be prepared, and I shall at once pay the price, agree-

able to the table sent me, estimating my age at 56, which it is. I have the honour to be, &c.

(Signed) JOHN GEDDES.

No. LVI. Colonel Geddes to Lord Eglinton.

Verreville, February 22,
1815.

MY DEAR LORD,

I am honoured with your Lordship's favour of the 20th instant, and cheerfully agree to the proposal there made.

Your Lordship's agent can send the draft of the disposition, and I will direct my agent here to complete the same, and to take the infestment, and the sooner the better. The money is ready. I have the honour to be, &c.

(Signed) JOHN GEDDES.

No. LVII. Mr. Simpson to Mr. J. Geddes.

DEAR SIR,

May 26, 1815.

I am this evening favoured with your letter to Mr. Martin, relative to your freehold qualification in Renfrewshire. Mr. Martin is at present from home; but I beg to inform you that your infestment was passed nearly six weeks ago, and the instrument of sasine was immediately afterwards sent to the registration office, to be recorded. It has not yet been returned to us, but we expect it, along with the others, in about a week. I am, &c.

(Signed) A. H. SIMPSON.

For Mr. Martin and Self.

John Geddes, Esq. Verreville,
Glasgow.

No. LVIII. John Geddes, Esq. to Martin and Simpson.

1815.

April 14. Going to Eaglesham, and infesting
you in lands there, on life-rent

disposition, by the Earl of Eglinton, in your favour, and drawing			
Latin instrument of sasine, six sheets	l.	s.	d.
Instrument-money	4	4	0
Paid your proportion of chaise hire and travelling charges	0	2	6
Paid for stamped vellum	0	9	0
Paid extending same	0	11	6
Paid extending same	0	10	6
April 26. Paid carriage of sasine to Glasgow ..	0	0	3
May 25. Paid postage from you	0	0	4
Writing and booking letter to you in answer	0	3	4
31. Paid postage from you	0	0	4
June 13. Paid for recording your infestment ..	1	2	6
<hr/>			
	7	4	3
Drawing the life-rent disposition, and transmitting it to you for revisal ..			
	1	1	0
<hr/>			
	8	5	3
<hr/>			

13th October, 1815.—By cash in full.

(Signed) MARTIN and SIMPSON.

LETTERS, &c. RELATING TO ALL THE CASES
PRODUCED BY LORD EGLINTON AND HIS
AGENTS.

No. LIX. Deposition of Lord Eglinton.

Before Archibald Bell, Esq. Sheriff-depute of the county
of Ayr, &c.

N. B. The first part of this document relates to letters set forth in this Appendix, and produced by Lord Eglinton as a haver. The document concludes thus:—

The commissioner, on considering the terms of the commission, conceives that it does not include the private correspondence between his Lordship and his own

agents; and, therefore, that his Lordship is not obliged to produce the same. And all the letters or copies of letters above produced are marked by the deponent and commissioner as relative hereto; and depones, That he has not willfully put away or concealed any documents which might be called for under this commission, nor does he know that any such are in any other person's possession. All which is truth, &c.

No. LX. Letter from Mr. Robertson, Lord Eglington's Factor, to Mr. F. Martin—inclosed in the above.

Bower Lodge, January 20,
1816.

DEAR SIR,

On the subject of the freeholds, I have the Earl's authority to say, that 250*l.* may be fixed on as the price of each, with a life-rent annuity corresponding to this sum, according to the respective ages of the different parties.

Of that you have already a scale, and I should suppose, in the first place, that a scroll of a disposition might be made out on some one particular life (say your own), and this by Messrs. Russell, Anderson, and Tod, and sent out by them to the Earl, after which his Lordship would cause it to be signified to his different friends, who, if they agreed to it, the whole might be gone into without more delay. I am, &c.

(Signed) GEO. ROBERTSON.

Francis Martin, Esq. Writer,
Paisley.

No. LXI. Mr. Francis Martin, Writer in Paisley, to Messrs. Russell, Anderson, and Tod, W. S. Edinburgh.

GENTLEMEN, Paisley, 24th January, 1815.

On the preceding page I send you a letter which I received from Mr. Robertson, under cover from his Lordship.

You will please make out the draft of a disposition in my favour, to as much superiority as give a vote. I should prefer it upon Eastwood, if agreeable.

My age is 41, and the annuity corresponding to this is 7*l.* 10*s.* *per cent. per annum* upon my life.

I believe you have the scale made out by Mr. Robertson; but in case you have not, I enclose you the copy sent to me. As the Earl is desirous to have the votes immediately created, I shall be extremely obliged by your writing me when the draft of the disposition has been sent to him. I am, &c.

No. LXII. George Russell, Esq. to Francis Martin, Esq.

Edinburgh, 26th January, 1815.

I was yesterday favoured with your letter of the 24th instant, and by this post I send to Lord Eglinton drafts of the dispositions relative to the freeholds he meant to dispose of in Renfrewshire, together with a memorandum, stating what has occurred to me on the subject, and in consequence of which I have no doubt that you will be immediately sent to for your assistance in the business.

No. LXIII. Mr. Martin to Lord Eglinton.

Paisley, 4th February,
1815.

MY LORD

I have the honour of acknowledging receipt of your Lordship's letter of the 2d current, and beg leave to return your Lordship my most grateful thanks for the confidence you have been pleased to repose in me.

The possession in a freehold in the county of Renfrewshire is highly flattering to me, and it is no less gratifying to my feelings, *the idea that it will afford me an opportunity of promoting your Lordship's political interest in this quarter*, which has hitherto remained inactive.

I am quite satisfied of the legality, as well as the independence of the freehold votes your Lordship intends to create, and I have no objections, if it meets with your Lordship's approbation, to pay for an increase of the feuduty proposed to be given with each vote, according to the table transmitted to me, so as to make the amount 15*l.* or 20*l. per annum*; but this entirely as your Lordship shall consider proper.

My age is 41; Mr. Russell can therefore regulate the price by the table accordingly. I have the draft of a disposition, which came under your Lordship's cover to me two days ago, accompanied with Mr. Russell's notes, which I shall take the liberty of returning to him, if your Lordship does not require it to be transmitted to you.

It appears to be Mr. Russell's opinion, that the calculation of the valuations of the different freeholds is rather too close. No doubt, they are as near to the legal amount as it is possible to make them; but as the valuations are accurately taken from the cess-books, *it would be a pity to extend the amount of each vote far beyond the legal quantity, so as to make a sacrifice of a vote, if it is possible to save it.*

Eaglesham affords eight qualifications,			
including the old retours on Floors,			
and leaves a surplus of	169	1	2
Eastwood, after deducting 11 <i>l.</i> 13 <i>s.</i> 6 <i>d.</i>			
thrown into one of Eaglesham votes,			
extends to	608	6	6

Amounting together to	777	7	8
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which is within 33*l.* of making two votes more; and if your Lordship is superior of John Givan's Mains of Eastwood, it stands valued at 73*l.* 6*s.* 8*d.* which is sufficient to make up the vote. I do not know how this stands, but Mr. Russell will perhaps know. If your Lordship is not superior of Mains, then the spare valuations may be divided as he proposes, because it is insufficient to make a vote of itself; but if it is very near that, I think it prac-

licable, for the necessary quantity to complete it, to be obtained from some proprietors in the county, in which case *your Lordship would be able to create ten votes in all*, besides the two already held by General and Mr. Montgomerie.

As soon as your Lordship has fixed upon the names of the voters, I shall furnish Mr. Russell with the descriptions for each, as he requires in his notes.

I took the liberty of mentioning to Mr. Robertson, on a former occasion, the wish of my partner, Mr. Simpson, to hold one of your Lordship's votes; *I think I can safely pledge myself for his attachment to your Lordship's interest*, and I beg leave most respectfully to recommend his application to your Lordship's consideration. I have the honour to be, &c.

(Signed) FRA. MARTIN.

No. LXIV. Francis Martin, Esq. to George
Russell, Esq.

Paisley, 7th February,
1815.

DEAR SIR,

Along with this you will please receive a new cast and description of My Lord Eglinton's lands in Eaglesham parish, the superiority of which is to be conveyed in life-rent, as formerly proposed. This cast affords eight votes, including the retour of Floors.

I also enclose you in this packet the draft of one of the life-rent dispositions, which I presume is correct. But in a letter from his Lordship to me, of date the second current, he says, "I am to convey the superiority of my own property lands, to afford a freehold qualification in life-rent, with a feu duty, payable by me to the life-renter, of 5*l.* sterling yearly. The price I receive, will be the value of the 5*l.* upon the life of the person to whom this conveyance is made, conform to the most approved tables of annuities." He afterwards adds: "Should it be more agreeable to you to have a larger sum of feu-

“duty, although it can make no difference to the title, “and, therefore, appears quite unnecessary,) be so good as “to inform me to what extent you would wish it, and I “will take it into consideration.” Now will it not be necessary to take notice of the feu-duty in the disposition? The sums will vary according as the disponees purchase a greater or less quantity of feu-duty. The particulars of which, and the names of the disponees, will most likely be transmitted to you by his Lordship this week.

I also enclose you the draft of the disposition for separating the property from the superiority, which is to *be filled up in your favour.*

As his Lordship has expressed his anxiety to get the votes made effectual as soon as possible, I trust you will get the disposition expedited at your earliest convenience.

I have not kept any copy of the valuation of Eastwood, but you have the certificate from the cess-books, which will enable you to describe the lands when you come to convey them. I may observe, however, that many of the possessions are now in the hands of other persons than those who are stated as the possessors when the valuations were split in the cess-books; but I presume this will make no difference in the description now, if the words “as some time possessed by,” are used. I am, &c.

No. LXV. Lord Eglinton to Mr. Martin.

Eglinton Castle, 14th February,
1815.

SIR,

Being most anxious to have the Renfrewshire freeholds completed as soon as possible, I do not delay a moment answering your letter of yesterday. I thought that it had been understood that I had fixed upon 5*l.* to go with each vote, so that the price will be regulated by the table; the names and ages only wanted, which I will now fill up as far as I can. Colonel Geddes, 56 years past.—Hugh Crawford, Esq. writer, Greenock, returns himself between the age of 52 and 54.—John M’Kerrell concluded his 56th

year the August 1814.—William Donaldson, Esq. physician in Ayr, 36 years.—James Crichton, 43.—Yourself and your partner you can fill up, and I request you will call upon Mr. Humphrey Graham, W. S. who I have every reason to believe will be a purchaser, and who will inform you of his age, which completes the number, eight.

You will observe by this that I still give a preference to your partner, Mr. Simpson, and, upon consideration, I think it but fair, as, in fact, I knew only at the time of one of the M'Kerrells. This, I hope, will finish the transaction; at all events, the sums need not delay the making out the dispositions and conveyances, so that the gentlemen may be infest without delay, and I trust that this may be done before the Exchequer term rises. I have not time to write Mr. Russell, but request you will be so good as to read him this letter. Upon reading your letter over again, I am glad to observe you say that you will be able to bring the disposition with you. I am, &c.

(Signed) EGLINTON.

No. LXVI. Mr. Martin to Lord Eglinton.

Paisley, 20th February,

MY LORD,

1815.

I had the honour of your Lordship's letter of the 14th current, when in Edinburgh, and as it appeared to me to contain all the information requisite, I devoted part of two days in arranging the descriptions of the several parcels of land with Mr Tod, preparatory to the drawing of the dispositions.

After finishing this, however, I found that both Mr. Russell and Mr. Tod had some difficulties to remove, which they requested I would state in a *personal conversation* with your Lordship, *as it would be improper to commit them to writing*, and that I should wait upon you for that purpose. It occurs to me that I can state what was said to me to Mr. Robertson, at Eaglesham, this week, who can report to your Lordship on his return to

Eglinton Castle. But if your Lordship should think it necessary for me to wait on you for the purpose myself, I shall accompany Mr. Robertson from Eaglesham, on hearing from your Lordship previous.

I beg to return your Lordship my grateful thanks for the preference which you have shewn to Mr. Simpson, in the list you did me the honour to transmit me, and have the honour to be, &c.

(Signed) FRA. MARTIN.

No. LXVII. Francis Martin, Esq. to George Russell, Esq.

Eglinton Castle, 24th February,
1815.

DEAR SIR,

I have, this afternoon, had the honour of an interview with my Lord Eglinton. The alteration of the feu-duties in the dispositions intended to be granted by his Lordship of the superiorities in Renfrewshire has been agreed to by the gentlemen to whom they are to be granted, and I am directed by his Lordship to send draughts of the dispositions, leaving blanks for the price and feu-duties, to the several gentlemen interested, to be filled up by their agents, his Lordship being desirous to make the matter quite agreeable to all of them. I shall, therefore, on my return home to-morrow, transmit the scrolls accordingly, leaving the description of the lands also blank, as this will fall to be filled up by you, from the arrangement made with Mr. Tod when I was in Edinburgh; after which they can immediately be returned to me, that they may be put into the gentlemen's hands, to get extended by their agents.

In the meantime, it will be proper for you to go on with the trust disposition to the feus of the different lands, preparatory to the execution of the feu-dispositions.

His Lordship desires me to say, that he accepts of Mr. Graham's offer, and he requests that you will be so good as mention so to him; and now, that there appears to be

nothing in the way of getting matters brought to a speedy termination, he hopes that you will forward the dispositions, so far as depends on you, without delay, and ann, &c.

(Signed) FRA. MARTIN.

Nb. LXVIII. Francis Martin, Esq. to George Russell, Esq.

Eglinton Castle, 25th February,

DEAR SIR,

1815.

Upon perusing the two precepts of *clare*, lately granted by the Earl of Eglinton, in favour of Mr. Brown of Nether Borland, and John Mather in Muirhouse, I find that the lands of Nether Borland are described as being a ten-shilling land of *old extent*, and Muirhouse a twenty-six shilling land of *old extent*; but I can discover no retour of these lands, although certainly one must be. If any retour could be found of these lands, there is a retour of the ten-shilling land of old extent of Windhill, which would be sufficient to make up another vote in Renfrewshire. May I take the liberty of requesting that you will be so obliging as write me on the subject as soon as possible?

Besides the eight votes upon Eaglesham, there is superiority sufficient for another upon Eastwood, which my Lord Eglinton has also signified his intention to dispose of. I do not know the amount of the feu-duties payable to his Lordship on Eastwood; but if they do not amount to 5*l.* the price of the vote must be less in proportion to the deficiency, in reference to the Eaglesham votes.

It occurs to me, after different conversations with his Lordship, that twenty guineas may be specified as the price of the vote, exclusive of the price of the feu-duty; and upon this principle the purchasers can easily regulate the amount of the feu-duty, as his Lordship leaves it to themselves to increase or diminish the proposed sum of 5*l.* as they feel inclined, and this freedom of choice will no doubt produce a difference in the purchase prices in

a most all the dispositions, which is what appeared to me to be your opinion should be the case. If any thing occurs to you on the subject, I shall be extremely happy to hear from you, and am, &c.

(Signed) FRA. MARTIN.

Might not a small portion of valuation be taken from Eaglesham, and added to Eastwood, in which case the feu-duty could be fixed according to the wish of the purchasers? I have read the above letter to my Lord Eglinton, who begs you will write by return of post.

No. LXIX. George Russell, Esq. W. S. to Francis Martin, Esq. Writer, Paisley.

27th February, 1815.

I am favoured with your letters of the 24th and 25th instant. You mentioned, that, at the Earl's desire, you are to transmit drafts of the disposition, leaving blanks for the price and feu-duties to the several gentlemen who are to become purchasers; and you then add, "in the meantime it will be proper for you to go on with the trust-disposition to the feus of the different lands, preparatory to the execution of the feu-disposition." Now, I am quite at a loss to understand this. You will recollect that I stated to you distinctly when you were here, that we could not move one step until the feu-duties to be attached to each parcel were ascertained, but that so soon as we were informed of the amount of these respective feu-duties, the feu-disposition for creating the vassalage, and in which the feu-duties must necessarily be inserted, would be made out and sent to be executed by the Earl. And after this, the sasine being taken, on the feu-right, nothing remained to be done but to convey the superiorities to the different purchasers at the stipulated prices. The feu-dispositions are granted in trust, but as to any other trust-disposition, I really cannot imagine what it would refer to.

We have examined our retour-book for Renfrewshire,

but do not find any separate retours either for Nether Borland or Muirhouse. We observe a two-merk land of Weitland and Borlands, in the lordship of Sempill, and a Muirhouse, as part of the seven-pound land of Leye; but nothing can be made of these *cumulos*, unless the separate extent of each parcel had been given.

The feu-duty of the whole of Eastwood is 5*l.* and a proportion of this could be conveyed corresponding to the extent of the superiority, that is to constitute a freehold. I am afraid it would derange the state you have already made up if you were to take part of the Eaglesham valuation and add it to Eastwood; but you will be able to judge of this from the materials in your hands.

What you have proposed, as to putting a certain value on the freeholds, and modifying the feu-duties, according to the inclination of purchasers, is agreeable to what I suggested, and I hope you will soon be able to inform me what the feu-duties of the different parcels are to be, so that no time may be lost in completing the feu-rights.

No. LXX. Francis Martin, Writer in Paisley, to
George Russell, Writer to the Signet.

Paisley, 6th March, 1815.

I send you Mr. M'Kerrell's, Mr. Simpson's, and my own dispositions for your perusal. I wish Mr. Tod would be so obliging as correct the description in mine, as I have copied it from some loose notes, which I cannot depend upon, and he has the certificate of the valuation, which is correct. Have the goodness to return the drafts to me, after you have perused them, although I am aware that they cannot be signed until you have arranged the whole feu-duties, and got the dispositions to the feus. I have requested of the other purchasers to forward their drafts to you with all speed, and I am, &c.

(Signed) FRANCIS MARTIN.

No. LXXI. Mr. Russell to Mr. Martin.

Edinburgh, 9th March, 1815.

I am favoured with your letter of the 6th instant, with drafts of three life-rent dispositions of Lord Eglinton, in favour of yourself, Mr. M'Kerrell, and Mr. Simpson; but to revise these deeds before the feus are created, would be putting the cart before the horse, and might lead to confusion. I expect the Earl in town to-morrow, and hope while he is here to get all the feu-dispositions executed; and this being once done, the conveyances of the superiority will go on in regular course. I take it for granted that I shall immediately be apprised of the extent of all the respective feu-duties.

No. LXXII. Mr. Martin to Mr. Russell.

Paisley, March 13, 1815.

I inclose you Colonel Geddes's disposition, which, after you have revised and filled up the description you will please return me, to be given to his agent to extend.

No. LXXIII. Mr. Hugh Tod, Writer to the Signet, to Mr. Martin.

Edinburgh, March 27, 1815.

I return you, as a parcel by this evening's mail, the drafts of the dispositions by Lord Eglinton to yourself, Mr. Simpson, Mr. Geddes, and Mr. M'Kerrell, which you may get extended, and then forward them, with the scrolls, to Mr. Crichton, who will get them executed by Lord Eglinton. I have mentioned to Mr. Crichton, that the two last cannot be signed until we receive back from Mr. Lamont a renunciation of a life-rent right which he holds over certain parcels of the lands contained in them, and which has been sent to him in England for his sub-

scription; but this need not delay your sending to Mr. Crichton the extended disposition. Mr. Ferrier, the accountant, struck the feu-duty to be paid to Mr. Geddes at 8*l.* 11*s.* 10*d.*, holding the purchase-money to be 79*l.*, and his age 56.

No. LXXIV. Mr. Tod to Mr. Martin.

Edinburgh, March 27, 1815.

I have only to say, that the deed of renunciation by Lamont has just come to hand, and that the dispositions to the superiority may therefore be completed as speedily as the parties incline.

No. LXXV. Extract from Letter Mr. Tod to Mr. James Crichton, Writer, Irvine.

Edinburgh, 27th March, 1815.

We have revised and adjusted the whole of the dispositions to the superiority, in order that they may be got extended in the meantime. The drafts of those of Dr. Donaldson and yourself, we send you as a parcel by this evening's mail-coach. The feu-duties are 5*l.* each, and Mr. Ferrier has struck the Doctor's purchase-money at 61*l.*, taking his age to be 36, and yours at 56*l.*, holding your age to be 43. This is besides 21*l.* for the votes. We also send the extract of Lord Boyd's retour, upon which your vote proceeds.

You will please observe, that, with the exception of the disposition to Mr. Martin and Mr. Simpson, none of the others can be signed by the Earl until we advise you that Lamont has signed and returned the renunciation.

No. LXXVI. Mr. Tod to Mr. Crichton.

Edinburgh, March 27, 1815.

I am happy to inform you that since writing you, as above, the deed of renunciation by Lamont has been re-

ceived and is put on record, so that you need not delay getting one and all of the dispositions to the superiority, signed by the Earl, how soon they come to hand.

No. LXXVII. Mr. Crichton to Messrs. Russell, Anderson, and Tod.

Irvine, 31st March, 1815.

I am favoured with both your letters of the 27th, and the packet containing drafts of the dispositions by the Earl of Eglinton to Dr. Donaldson and myself,—also extended dispositions by his Lordship to H. Graham, Hugh Crawford, and M'Knight Crawford. The three dispositions are signed. I forwarded Dr. Donaldson's on the 29th to Ayr by the Earl, who has since been there. I expect it to-morrow, when the whole five will be sent you along with the tack of Auchinmead, which you wrote for, to make out the articles of roup of that farm.

I have not heard from Mr. Martin with the other dispositions, but when they are sent will be attended to. I have fixed with the Earl that the prices of the whole of these freeholds are to be paid to you.

No. LXXVIII. Mr. Crichton to Messrs. Russell, Anderson, and Tod.

Irvine, 3d April, 1815.

I have this night sent, to go by coach to-morrow from Kilmarnock, the dispositions, by the Earl of Eglinton, in favour of Humphrey Graham, Esq., Hugh Crawford, Esq. and William M'Knight Crawford, Esq., as you desired, also the scroll of the one in favour of Dr. Donaldson, and extract tack of Auchinmead.

No. LXXIX. Mr. Crichton to Messrs. Russell,
Anderson, and Tod.

Irvine, 7th April, 1815.

This morning I sent off to Kilmarnock, to go by the coach, a sealed parcel, addressed to you, containing the four scrolls of dispositions, by the Earl of Eglinton, which were sent me from Mr. Martin, on the 5th current, and executed the same day, also the scroll of my own, from his Lordship.

No. LXXX. Note showing the Annuity Price,
and Feu-Duty, attached to each of the nine
Freeholds.

	Feu-duty.			Price.		
	£.	s.	d.	£.	s.	d.
1. Hugh Crawford	3	12	6	56	7	0
2. William M'Knight Crawford,	5	0	0	95	9	0
3. Humphrey Graham	5	0	0	100	0	0
4. Francis Martin	3	7	3	66	0	0
5. Alexander H. Simpson	5	4	0	100	0	0
6. John M'Kerrell	5	4	2	75	0	0
7. John Geddes	8	11	10	100	0	0
8. James Crichton	5	0	0	77	0	0
9. Dr. William Donaldson	5	0	0	82	0	0

Interrogatories in the Condescendence for John
Shaw Stewart, Esq., and Robert Stewart, Esq.,
and answers thereto, for William Macknight
Crawfurd, Esq.

30th January, 1818.

Q. 1.—Whether the complainer had any intimacy or Nos. 44 and
intercourse with Lord Eglinton, previous to 9th February, 47 of process.
1815? If he had so, state what it was.

A. 1.—Above twelve years ago, the complainer met Lord Eglinton at the Ayr races, to whom he was introduced. This circumstance he had forgot, till lately put in mind of it. He has not since that time had the honour of being in his Lordship's company.

Q. 2.—Whether upon any other ground of family connection, or otherways, he had any reason to expect that Lord Eglinton would sell him any property for less than its full market-price? If he had, to state the same.

A. 2.—The complainer has no reason to think that Lord Eglinton would sell him any property at less than his Lordship thought a fair price.

Q. 3.—Whether he ever employed any person (excepting Mr. Hugh Crawford, to whom subsequent interrogatories apply), to make proposals to the Earl for his receiving a life-rent, or other qualification for him, previous to 9th February 1815? If so, state the particulars of that correspondence and negotiation.

A. 3.—The complainer never employed any person to make proposals to the Earl: The part Mr. Hugh Crawford took in this business, falls to be explained afterwards.

Q. 4.—Whether the complainer has been several years acquainted with Hugh Crawford, writer in Greenock, and lived in habits of intimacy with him, both previous to and in the course of the year 1815?

A. 4.—The complainer, since his infancy has been acquainted with Mr. Hugh Crawford, writer in Greenock, and has lived in habits of intimacy with him, both previous to, and in the course of the year 1815; but owing to a particular circumstance, he was very little in Mr. Hugh Crawford's company towards the end of 1814, and during the whole of 1815.

Q. 5.—Whether, previous to the year 1815, and during that year, the complainer took the chief management of the estate of Cartsburn, belonging to his mother, and corresponded with Hugh Crawford, and gave instructions relative to the management of that estate.

A. 5.—The complainer, during the lifetime of his father,

was frequently employed to copy some, and to write other letters to Mr. Hugh Crawford, about the management of Cartsburn: and since his father's death his mother has managed all her business through him.

Q. 6.—Whether, between 27th January and 9th February 1815, he met with Mr. Hugh Crawford at Edinburgh or elsewhere, and had conversation with him with regard to the liferent freehold Mr. Crawford was to receive from Lord Eglinton? Whether he had one or more conversations; to state the particulars of these conversations.

A. 6.—On Saturday the 4th February 1815, the complainer dined at the Pitt Club, at which dinner Mr. Hugh Crawford was present. On the 5th, the complainer called at Mr. Leven's for Mr. Crawford, who accompanied him to Ratho House; staid all night, and went next morning to Glasgow by the mail coach. The complainer does not recollect that the subject with regard to the liferent freehold Mr. Crawford was to receive from Lord Eglinton was even mentioned.

Q. 7.—Whether, previous to 9th February 1815, he authorised Mr. Hugh Crawford to apply to Lord Eglinton for 180*l.* of valuation, or if he could not obtain that for a liferent freehold qualification?

A. 7.—The complainer has, for many years past, wished to add a freehold to the estate of Cartsburn: this wish he uniformly expressed in the most open manner, and he more than once hoped to have made a purchase. With the steps he took, Mr. Hugh Crawford was made acquainted; but he does not recollect of giving any instructions to Mr. Hugh Crawford, to apply to Lord Eglinton either for 180*l.*, or for a liferent freehold qualification. At the same time, Mr. Hugh Crawford was perfectly aware, that the complainer would be most happy to purchase either the 180*l.*, or the liferent.

Q. 8.—Did the complainer receive Mr. Hugh Crawford's letter of 13th February 1815, ingrossing copy of Lord Eglinton's letter, 11th February 1815.

A. 8.—The complainer received and produced the letter.

Q. 9.—Did the complainer receive Mr. Hugh Crawford's letter of 14th February 1815, ingrossing copy of Lord Eglinton's letter of 12th February 1815.

A. 9.—The complainer received and produced this letter.

Q. 10.—Whether, from these letters or otherwise, the complainer understood, that other persons besides Mr. Hugh Crawford and himself were to receive freehold qualifications from Lord Eglinton in the county of Renfrew?

A. 10.—Till the complainer was refused the freehold on account of Mr. Mackerrell's acceptance, he was ignorant that any other person, save Mr. Hugh Crawford, had purchased a life-rent vote in Renfrewshire from Lord Eglinton.

Q. 11.—When did he first hear of that circumstance, and from whom, and what was the nature of the information he received?

A. 11.—The complainer first heard from Mr. Dillon, that others besides Mr. Hugh Crawford and Mr. Mackerrell, had purchased from Lord Eglinton; but with even their names he was unacquainted until he went to the county meeting, at which his claim for enrolment was rejected. It was after the complainer had made his own purchase, when Mr. Dillon mentioned that others were to be infeft on the same charter.

Q. 12.—Did the complainer receive a letter from Mr. Hugh Crawford, written on or about the 27th February 1815, containing a copy of Lord Eglinton's letter of 25th February 1815?

A. 12.—The complainer did not receive this letter.

Q. 13.—If he did not receive it, say whether he knows or suspects what is become of the said letter from Mr. Hugh Crawford, containing copy of Lord Eglinton's said letter of 25th February 1815.

A. 13.—The complainer left Ratho House on the 27th February 1815; and on the 28th he arrived at Broadfield,

near Port-Glasgow, where he remained some time. During his visit there, he occasionally saw Mr. Hugh Crawford. If, therefore, Mr. Hugh Crawford did write, and put a letter into the post-office of date 27th February, 1815, that letter would go to Ratho House, and would from thence be forwarded to the complainer, at Mr. Hugh Crawford's office, Greenock, the direction that the complainer left for his letters, which were to be forwarded to him. When the letter arrived there, he suspects it would either be used as waste paper, or perhaps returned to the post-office. He has in vain made many inquiries and searches about this letter. *

Q. 14.—Whether the complainer received from Mr. Hugh Crawford, Lord Eglinton's three principal letters of the 11th, 12th, and 25th February, 1815, produced by the complainer? State where, when, and on what occasion, he received these three principal letters, and what conversation took place on his receiving them.

A. 14.—In January, 1817, Mr. Dillon mentioned to the complainer, that he wished to have the originals, or copies of all the letters that mentioned any thing about the freehold qualification. The complainer requested Mr. Hugh Crawford to look out and send him any letters, or copies of letters, that he might have, noticing in any way the subject of the complainer's freehold. Mr. Hugh Crawford thereupon sent to the complainer these three principal letters of Lord Eglinton.

Q. 15.—Whether Mr. John Dillon, the complainer's law-agent in Edinburgh, proceeded upon the directions and informations he received from Mr. Hugh Crawford to make up the titles?

A. 15.—As this is a question that can be answered alone by Mr. John Dillon, the complainer must refer it to him. The complainer supposes that Mr. Dillon derived the first knowledge of the bargain from Mr. Hugh Crawford. Mr. Dillon afterwards received information from Mr. Tod, and from the complainer. It appears by a letter from Mr. Hugh Crawford to Mr. Dillon, of date 11th April, 1815,

and Mr. Dillon's answer, of date 12th of that month, Nos. 29, and 30, of Appendix, that Mr. Dillon did not communicate with Mr. Crawford as to the steps he was taking.

Q. 16.—Was it at the desire of the complainer that Mr. Hugh Crawford wrote to Mr. Dillon relative to this vote?

A. 16.—The complainer does not recollect of giving Mr. Hugh Crawford any directions to write to Mr. Dillon on this occasion: he does not recollect of ever seeing Mr. Hugh Crawford's letter to Mr. Dillon, till after the commencement of this process.

Q. 17.—Did the complainer write to Mr. Dillon on that occasion? If he did, he is desired to say if he knows or suspects what became of his letters to Mr. Dillon?

A. 17.—The complainer can find no copy or jotting of any letter to Mr. Dillon on this occasion. If he did write, the letter would be sent by post. He supposes Mr. Dillon keeps his letters.

Q. 18.—Whether the complainer produced, when cited as a haver, Mr. Hugh Crawford's letters to Mr. Dillon, dated 14th and 17th March and 11th April, 1815, and copy letter by Lord Eglinton to Mr. Hugh Crawford, inclosed in Mr. Hugh Crawford's letter of 17th March?

A. 18.—The complainer produced Mr. Crawford's letters to Mr. Dillon, of 14th and 17th March, 1815; he did not produce the letter of 11th April, 1815.

Q. 19.—Whether the price of the freehold was at one time calculated at 74*l.* 9*s.* or thereabout?

A. 19.—The complainer never heard of this calculation till after the price had been fixed and paid.

Q. 20.—Whether the price which he or his agents ultimately agreed to pay, was 95*l.* 9*s.*?

A. 20.—The price agreed upon was the only one that was fixed or proposed, and was 95*l.* 9*s.* which was the sum paid.

Q. 21.—What was the cause of the difference?

A. 21.—There was no difference, and therefore no cause of difference.

Q. 22.—Was the complainer consulted with regard to paying that difference?

A. 22.—As there was no difference, there was no consultation about it.

Q. 23.—When, and by whom was he consulted, and did he give any instructions relative to it?

A. 23.—He was not consulted about the difference, as none existed.

Q. 24.—Whether the complainer did not bring with him, on the day fixed for his examination as a haver, the ten writings specified in the inventory from No. 14, to No. 24, inclusive?

A. 24.—The complainer took in all the letters he had discovered, with the exception of the three principal letters above mentioned, from Lord Eglinton, and gave them to Mr. Dillon. But Mr. Dillon then told the complainer, that he ought to produce these three letters also. There was not time for him to return to Ratho House that day and bring them in. He, therefore, left those which he had brought with Mr. Dillon, and on a succeeding day, he again returned to Edinburgh, and brought with him the three said letters, which were also put into the inventory, and he accompanied Mr. Dillon to the Outer House, where Mr. Dillon gave the letters, &c. to Mr. Patrick, who took them away with him. Some time afterwards, perhaps half an hour, Mr. Patrick returned, and told the complainer, that there was no occasion for his longer attendance, nor for his examination on oath, which the complainer testified his willingness to give.

Q. 25.—Did he state to the Respondent's counsel, that on his word of honour, these were all the writings he had relative to the transaction, in consequence of which his examination on oath was dispensed with?

A. 25.—In answer 24, this question is fully answered, and the complainant could only repeat that answer, to which he refers.

Q. 26.—Whether these were, or were not, the whole papers and letters that were in his possession at the time?

A. 26.—These were all relative to this transaction, and included within the diligence, that he had discovered to be in his possession at the time.

Q. 27.—Whether he has since discovered any other papers or letters relative to this transaction between Lord Eglinton and him? If he has, he is desired to produce them.

A. 27.—The complainer did afterwards discover a jotting of a letter from himself to Lord Eglinton, of date 4th March, 1815, which he immediately sent to Mr. Dillon, and it was printed page 9th of his petition; had he discovered any other, he would instantly have sent them, but he has not found any other.

Q. 28.—Whether he wrote a letter to Lord Eglinton upon 4th March, 1815?

A. 28.—He did write that letter mentioned in the preceding answer.

Q. 29.—Whether he ever wrote any other letter to Lord Eglinton, or had any other correspondence or communication with him, directly or indirectly, after 9th February, 1815, otherwise than through Mr. Hugh Crawford? If he had, to state what it was.

A. 29.—The complainer never wrote any other letter to Lord Eglinton, nor had any correspondence or communication with him directly or indirectly, except that which has been fully and distinctly stated in the previous answers.

Q. 30.—Whether, previous to 29th March, 1815, he had any conversation with any person at Greenock, or at any place in the county of Renfrew or elsewhere, relative to Lord Eglinton's measures for bringing forward and disposing of his dormant freeholds, in the county of Renfrew, or heard any thing thereof?

A. 30.—Previous to 29th March, 1815, the complainer never knew or heard of Lord Eglinton's measures for bringing forward and disposing of his dormant freeholds in the county of Renfrew.

Q. 31.—Was any progress of titles, or search of incumbrances on Lord Eglinton's estate exhibited to you, or to your agents, or had you any information with regard to them?

A. 31.—No progress of titles, or search of incumbrances on Lord Eglinton's estate was exhibited to the complainer, nor had he any information with regard to them.

He refers to his agent Mr. Dillon, for a further answer to this question, to whom he trusted the conducting of this business.

W. MACKNIGHT CRAWFURD.

Ratho House, 26th January, 1818.

Minute for John Shaw Stewart and Robert Stewart, Esqrs. containing additional interrogatories.

6th February, 1818.

In terms of the above interlocutor, and under the reservation and explanation contained in their former minute of 13th January last, the Respondents now propose the following additional queries to the complainer, Mr. Macknight Crawford:

1mo. When the complainer mentions, in answer to query 5th, that his mother managed all her business through him, does he not mean, that she managed her whole business, and particularly the business of the Cartsburn estate, through the complainer; and was not Mr. Hugh Crawford the factor and country agent who managed the Cartsburn estate under the complainer, and with whom the complainer, previous to and during the year 1815, corresponded in that character?

2do. The complainer has stated, in answer to query 6th, that when he saw Mr. H. Crawford, on the 4th of February, and afterwards went with him to Ratho-House, on the 5th, "he does not recollect that the subject, with regard to the life-rent freehold Mr. Crawford was to re-

ceive from Lord Eglinton, was even mentioned." He is desired to read Mr. H. Crawford's letter to him of the 13th February, 1815, written on his return from Edinburgh, in which he says, " My dear Friend, I lost no time *upon my return*, in writing to the Peer of Eglinton, and last night's post brought me a letter from his Lordship, " which I now beg leave to transcribe;" and he is desired to say, whether this letter does not refer to a previous conversation between Hugh Crawford and the complainer, in which it had been agreed, that Hugh Crawford should apply to Lord Eglinton, for one of his votes to the complainer?

3*to*. The complainer is also desired to read the following passage in his reclaiming petition, page 7, viz. " To that gentleman himself, (Mr. Hugh Crawford) Lord Eglinton had offered to convey a superiority in life-rent, at the *value of the feu duties*, calculated at a price, according to the tables for ascertaining the worth of annuities. This circumstance Mr. Crawford mentioned to the petitioner *in conversation, when he happened to be at Edinburgh, and to be with the Petitioner at his seat of Ratho, in this neighbourhood, about the beginning of February, 1815, stating verbally the price and mode of calculation*, without showing to the Respondent any letter from Lord Eglinton; and the Respondent immediately said, that *at this rate* he would willingly purchase either superiority to the extent of 180*l.* in valued rent. or to the amount of an entire qualification." The complainer is desired to say whether this statement was not made by his authority, and whether the same was not correct, according to his recollection at the time.

4*to*. In query 10th, the Respondents inquired, whether the complainer understood, from letters or otherwise, that other persons besides Mr. H. Crawford, himself, were to receive freeholds from Lord Eglinton. In answering the query the complainer states, that he was ignorant that any other person, save Mr. Hugh Crawford, had "*purchased a life-rent vote*" from Lord Eglinton. The complainer

is requested to read the passages after quoted from the following letters, viz. 1st, From Lord Eglinton's letter to Hugh Crawford, of 11th February, 1815, (admitted to have been received by the complainer) in which Lord Eglinton writes, "I will be happy, therefore, that he, (the complainer) will purchase one of those, *on the terms I have been advised to propose*; and as you mention *that he will accept it*, I have wrote Mr. Martin, in case the number is not filled up, if possible to give a preference to Mr. Crawford in the room of *some other*." 2d, The passage from Lord Eglinton's letter to H. Crawford, of 12th February 1815, (also admitted to have been received by the complainer) in which his Lordship writes, "I have received a letter from Mr. Fulton M'Kerrel, accepting of the terms offered for the purchase of *one of the freeholds*;" and, 3dly, The passage from Lord Eglinton's letter of 25th February, (the contents of which the complainer admits to have been communicated to him at Greenock,) in which his Lordship writes, "I have *still another* freehold to dispose of in the county of Renfrew, which I am glad to have it in my power to offer to your friend Mr. Crawford. If he will have the goodness to accept it, I beg you will write to Messrs. Russell, Anderson, and Tod, mentioning his christian name and age, without delay, in the hope that his disposition may be made out, along *with the others* which I have given positive directions to be immediately completed." The complainer is now desired to state, Whether from these, or any other letters or information, he did not understand that freeholds in the county of Renfrew had been offered to other persons besides himself and Hugh Crawford? and Whether he was not aware that other persons were to receive, or were in treaty to receive, such freeholds?

5to. The complainer has stated, in answer to query 13, that he left Ratho-House, and arrived at Broadfield, on 28th February, 1815, where he remained some time, during which he occasionally saw Mr. Hugh Crawford; and it was during this period that he states, in his reclaiming

petition, page 9, that Mr. H. Crawford made a verbal communication to him of the contents of Lord Eglinton's letter of 25th February, and in the same page of the petition, he quotes a letter from himself to Lord Eglinton, written at Greenock, during the same visit; dated 4th March, 1815, in the following terms:—" Mr. Hugh Crawford has just " informed me that your Lordship has *still* a freehold in " this county to dispose of, and that you was *willing to* " *let me have it.* I shall be very happy to become the purchaser, and I have directed Mr. Crawford to write to " your Lordship's man of business on that subject;" and he states in his reclaiming petition, that it was the complainer " who himself accepted the purchase." The complainer is desired to say, whether he did not understand the above letter to be an acceptance on his part of the terms, previously offered by Lord Eglinton, in his correspondence with Mr. Hugh Crawford, both to Mr. Hugh Crawford himself, and to the complainer. If he shall say, that it was not an acceptance of these terms; then, whether there were any other terms of which it was an acceptance; what were these terms, and to whom communicated? The complainer is farther required to say, whether the terms which he states, in the above letters, that he accepted of had not previously been communicated to him, and stated to be the same as offered to Mr. Hugh Crawford himself, and if he shall say they were not communicated, then did the complainer write the above letter accepting of the freehold, while in ignorance of the price, and other terms on which it was offered.

6to. The complainer has said in his petition, page 10th, that Mr. Crawford communicated the transaction to Mr. Dillon, the complainer's agent, " and it was left to Mr. " Crawford to frame that communication as he saw fit." And again, " The only notification of the bargain to Mr. " Dillon, was contained in the above letter from Mr. " Hugh Crawford," viz. the letter of 14th March, in which Mr. Crawford writes:—" His (the complainer's) " age, between 29 and 30, makes the value of his life

“ 74*l.* 9*s.* Will you, therefore, immediately wait on “ Messrs. Russel and Anderson, and peruse the draft of “ the disposition, which can be filled up with the above “ sum, and then get it extended.” Is it not the complainer’s opinion that Mr. H. Crawford, in this letter, communicated the terms of the bargain which had been concluded with Lord Eglinton, to the best of his knowledge and belief at the time ; and does it not appear, from this letter, that the price fixed by Mr. Hugh Crawford was 74*l.* 9*s.*

7*mo.* The complainer is also requested to peruse Mr. Dillon’s answer to this letter of 15th March, where after mentioning the demand made by Lord Eglinton’s agents, at Edinburgh, of 21*l.* for the vote, besides the 74*l.* 9*s.* he writes—“ Please mention to me the number of years, and “ according to what table it is taken, that I may adjust “ the calculation to their mind ;” and Mr. Crawford’s reply of 17th March, in which he writes—“ I beg to inclose “ you a copy of the Earl’s letter to me, with the schedule “ of the lives. Mr. Crawford’s age is 30, so that you can “ be at no loss to fix the sum,”—and also to peruse the copy of Lord Eglinton’s letter, here stated to be inclosed, being the letter of 2d February, 1815, called the first circular (all which letters were produced by the complainer), and regarding which last-mentioned letter the complainer states, in his petition, page 11, “ that neither he nor his “ man of business knew of its existence till it was communicated by the preceding letter of 17th March, expressly to inform the latter of the principle on which the “ value of the freehold was calculated.” The complainer is desired to say, whether it does not appear from these letters, that the price, for which the freehold was offered by Lord Eglinton, was the value of 5*l.* of feu-duty, upon the life of the purchaser, conform to a table of annuities annexed ; and whether it did not appear, that according to this table, the price of the annuity, on the complainer’s life, amounted to 74*l.* 9*s.* ; and whether it does not appear, from the above letters, that Mr. Crawford, when he wrote

them, acted on the belief that he had made the purchase for the complainer at the above price of 74*l.* 9*s.*

8*vo.* The complainer states, in his reclaiming petition, page 12th, "That on receiving the information contained in the above letters, Mr. Dillon *immediately* waited on Messrs. R. A. and Tod, the agents of Lord Eglinton, in this city. He calculated the value of the annuity, and found it correct, to which was *added*, 20 guineas for the freehold, making the whole price 95*l.* 9*s.* To this, with the defender's (complainer's) *approbation*, he agreed." The complainer is required to say, at what time this meeting between him and Mr. Dillon took place, and whether it was not immediately after Mr. Dillon had received the above letter of 17th March, with its inclosure, and prior to Mr. Dillon waiting on Messrs. Russell, Anderson, and Tod, and finally settling the transaction as alluded to in the passage before quoted.

9*no.* Was the disposition by Lord Eglinton to the complainer prepared after this meeting, and was that deed subscribed by Lord Eglinton on the 29th March, 1815?

Answers for William Macknight Crawford, Esq. to the Additional Interrogatories.

1. The complainer has already stated in the most unqualified terms, that his mother managed all her business through him. The complainer did correspond with Mr. Hugh Crawford, as factor of his mother upon the estate of Cartsburn, and as her agent in the country, previous to, and during the year 1815.

2. The complainer has no recollection still, that any thing was said about "the life-rent freehold Mr. Crawford," (that is, as the complainer understands Mr. Hugh Crawford) "was to receive from Lord Eglinton," at the time here referred to. Neither has the complainer any recollection, that the subject of the complainer's own intention to purchase superiority, or a life-rent qualification, was then spoke of between them, either at Ratho House

or at Edinburgh. At this time there was no prospect of getting either. He recollects that their time was occupied when together upon that occasion, so far as they had leisure, with a law question then in dependence before the Second Division of this court, relative to some shore ground at Cartsburn. Indeed, the complainer is satisfied from the correspondence, that Mr. Hugh Crawford did not receive Lord Eglinton's letter to himself, of 2d February, 1815, till after he, Mr. Hugh Crawford, had returned from Ratho House to Greenock. Mr. Hugh Crawford wrote to Lord Eglinton, his letter of 9th February, 1815, without making any communication whatever to the complainer, of the letter of the 2d, which the Earl had written to him. The first communication Mr. Hugh Crawford made to the complainer of this correspondence, was by his letter to the complainer of the 13th February, produced.

3. The complainer entrusted the preparation of the reclaiming petition for him to his agent Mr. Dillon. He furnished to Mr. Dillon all the correspondence and copies which he had, and left it to Mr. Dillon and his counsel to make the proper use of these materials. The complainer did not revise the reclaiming petition when drawn, or see it before it was printed and presented. No statement in that paper alters or affects the complainer's own recollection of the facts. It is evident from the correspondence, that Mr. Hugh Crawford did not receive the communication from the Earl of Eglinton to himself, of the 2d February, 1815, till after he, Mr. Hugh Crawford, had returned to Greenock.

4. The complainer did not formerly answer to query 10th, that "he was ignorant that any other person, save Mr. Hugh Crawford, had purchased a life-rent vote from Lord Eglinton." His answer was, that he was ignorant of this, "till the complainer was refused the freehold, on account of Mr. Mackerrel's acceptance." The complainer had no information upon the subject of this additional question, except what he received from the terms of the

letters he has produced. He made no inquiry as to the offers or treaties of any other persons for freehold qualifications, and to the best of his recollection, he heard no more of their transactions with Lord Eglinton, than appears from the terms of the letters to which he refers.

5. During the complainer's visit at Broadfield, in the end of February and beginning of March, 1815, he recollects that his thoughts, which at no time have been much engrossed by county politics, were particularly disengaged from that subject. It has been only from finding the note of his letter to Lord Eglinton of 4th March, 1815, that he has been able to recollect the fact, that he then wrote to his Lordship ; and it is from the same evidence he is now satisfied that he had a verbal communication with Mr. Hugh Crawford at that time. The complainer has no recollection that he then knew the exact price required, nor does he believe that it had then been stated to him. He had no idea that any other terms could be proposed to him but the price, and no other terms but the pecuniary terms or price ever were, directly or indirectly, proposed to the complainer. He left Broadfield on the 26th March, and dined in Edinburgh on the 27th. He does not now remember that he actually then saw Mr. Dillon, or that Mr. Dillon then told him the sum of the price. But he has no doubt that he did on the 27th see Mr. Dillon at Edinburgh, and then learned from him the sum of the price. And he is certain that Mr. Dillon first informed him what the price was, and did so about this time. The complainer has a loose recollection, that from the first his impression was, that the price demanded would not exceed 100*l.* ; but he cannot remember upon what authority he took this impression. The complainer thinks it proper to add, that he does not now remember directing Mr. Hugh Crawford to write to Lord Eglinton's man of business while he was at Broadfield, and he has no reason to think that Mr. Hugh Crawford did write any such letter. The complainer's mind was otherwise engaged at the time. He did not suppose the circumstances to be of the small-

est consequence, and he has no farther recollection of these than he has stated.

6. The letter of Mr. Hugh Crawford to Mr. Dillon was not shown to the complainer, nor were its terms mentioned to him. He cannot, therefore, say what were Mr. Hugh Crawford's views when he expressed himself in these terms. It now appears to the complainer that Mr. Hugh Crawford then calculated only the value of the feu-duty, as an annuity upon the complainer's life.

7. The first precise information which the complainer can recollect that he got of the price was from Mr. Dillon. He did not see Mr. Dillon, nor hear from him on the subject of the price, so far as he can recollect, till Mr. Dillon wrote to him for the money, which he immediately sent without objection. He does not know what Mr. Hugh Crawford's belief was, farther than now appears from that gentleman's letter to Mr. Dillon. But the complainer has no reason to think that Mr. Hugh Crawford believed that he had made the purchase at the price of 74*l.* 9*s.* On the contrary, the complainer sees from the correspondence, that Mr. Hugh Crawford was informed by Mr. Dillon that the price was 95*l.* 9*s.*, and that Mr. Hugh Crawford made no objection to that price or remark upon it.

8. The complainer did not see Mr. Dillon, or hear from Mr. Dillon, so far as he recollects, from the 17th of March, till after the bargain was completed. Mr. Dillon did state to the complainer, as above mentioned, that the price was 95*l.* 9*s.*, and on the first demand the complainer sent him the money without objection.

9. The complainer has no doubt that Lord Eglinton's disposition was prepared after the 17th of March. But neither Mr. Dillon nor any other person made any communication to the complainer about the mode of preparing and executing that deed. He has no reason to doubt that it was subscribed by Lord Eglinton upon the date it bears.

W. MACKNIGHT CRAWFURD.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

LACHLAN MACKINTOSH, Esq. of Raigmore	} <i>Appellant.</i>
ALEXANDER MACKENZIE, Writer in Inverness.....	
	} <i>Respondent.</i>

By the common law of Scotland, as declared by an Act of Sederunt of the Court of Session, dated the 6th of March, 1783, sheriffs and judges of inferior courts are prohibited, under the pains of law for malversation in office, from acting as procurators in any cause depending before them, in their respective courts. But it seems that a prosecution can only be instituted against the offender with the concurrence of the Advocate-General, as public prosecutor; or, *ex officio*, by the superior court; whether a private person, who has suffered injury by the violation of the law, may proceed as for a private remedy—Quæry.

1819.

MACKINTOSH
v.
MACKENZIE.

BY an order of the Court of Session, dated the 6th of March, 1783, and entitled “An Act of Sederunt prohibiting *inferior judges* and their clerks from *acting as procurators or agents before their respective Courts*,” “The Lords of Council and Session considering that it is *contrary to law*, and subversive of the impartial administration of justice, for any judge to act as procurator or agent in any cause depending before his court; and as it is a similar abuse that any clerk of court, or his depute, having

“ trust and custody of processes and writs pro-
 “ duced therein, and being employed in extract-
 “ ing of acts and decreets, should be agents or
 “ procurators in these processes; and having
 “ observed in the course of certain processes
 “ depending in this court, that such illegal and
 “ improper practices have prevailed in some of the
 “ inferior courts, and may prevail in others; the
 “ Lords therefore, to prevent such abuse in time
 “ to come, do hereby strictly prohibit and dis-
 “ charge all *sheriff substitutes*, magistrates of
 “ burghs, and other judges whatever, and the
 “ sheriff clerks, clerks to baillie courts, and other
 “ clerks of court within Scotland, and their de-
 “ putes, not only from acting either directly by
 “ themselves, or *indirectly by mediation of any*
 “ *confident persons*, procurators or agents before
 “ their several courts, *in any action or cause de-*
 “ *pending or to depend before them*, but also from
 “ giving partial counsel or advice in any such
 “ action or causes; and that under *the pains of*
 “ *law for malversation in office, excepting always*
 “ herefrom petitions or applications for commit-
 “ ment. And they hereby appoint this act to be
 “ inserted in the books of Sederunt, and copies to
 “ be transmitted to each sheriff clerk, with in-
 “ junctions that he affix the same in the most
 “ patent place of his office, and transmit a copy
 “ thereof to the clerk of each baillie court and
 “ other court within his jurisdiction, with the like
 “ injunctions to affix the same upon the most
 “ patent place of their respective offices, that all

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 MACKINTOSH
 2.
 MACKENZIE.

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“ concerned may be certiorate thereof, and that
“ none may pretend ignorance.”

The sheriff depute of Inverness having appointed a sheriff substitute, in May, 1814, issued a commission, which, after stating the appointment of the grantor as sheriff depute, proceeds in the following terms: “ And whereas I am
“ sometimes necessarily absent, and that Thomas
“ Gilzean, Esquire, my *ordinary* substitute, may
“ happen to be necessarily *absent and indisposed*,
“ *or may be disqualified from his connection with*
“ *the parties, or otherwise, from judging in some*
“ *causes that may be brought before him; and as*
“ *it is regular that a proper person should be*
“ *named to act in my absence, or during the*
“ *absence or indisposition of the said Thomas*
“ *Gilzean as my substitute, in case of any emer-*
“ *gency or other business that may occur as afore-*
“ *said; and I being well satisfied with the fidelity*
“ *and capacity of Alexander Mackenzie *, Esquire,*
“ *banker in Inverness, for exercising and discharg-*
“ *ing the trust, and that he is well affected to his*
“ *Majesty's person and government; therefore*
“ *witt ye me to have nominated, constituted, and*
“ *appointed likeas I hereby nominate, constitute,*
“ *and appoint the said Alexander Mackenzie to be*
“ *one of my sheriff substitutes in the foresaid shire*
“ *of Inverness, during my pleasure; and the*
“ *absence, disqualification, or indisposition of the*
“ *said Thomas Gilzean, with full power to him in*
“ *my absence to hold courts, &c.*”

* The Respondent, who was also a writer.

This *commission* was dated the 12th May, and produced in court by Mr. Mackenzie on the 19th May, 1814, who qualified himself by taking the requisite oaths.

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On the 20th and 26th of May, 1814, Mr. Mackenzie appeared as procurator for Mr. Robertson of Inches, upon the execution of a commission granted by the sheriff to the clerk of his court, to take a proof in a cause in which the appellant was a party adverse to Mr. Robertson, the client of Mr. Mackenzie.

In the course of the proceeding under the commission, the Appellant's agent applied to the commissioner, who was clerk to the Respondent, to adjourn the proof, on account of the Appellant's absence. That application was refused, owing to the influence, which, it was alleged, the Respondent had over his clerk the commissioner, and to the injury and loss of the Appellant.

He therefore presented to the second division of the Court of Session *a petition and complaint* founded upon the Act of Sederunt, before stated, praying that the Respondent might be found incapable of acting as sheriff substitute, and suspended from his office, and also that he should be found liable in such damages or other penalties for malversation, as the Court might think just.

The Respondent, by his answer to this petition and complaint, insisted on four objections, of which the two first only are material to be stated, as being the foundation of the judgment.

1. That the complaint was incompetent, as

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presented without the concurrence of the procurator fiscal, or other public prosecutor.

2. That the Appellant had no title, even as a private prosecutor, to insist on such a complaint, inasmuch as he, having received no particular injury by the breach of the Act of Sederunt, had no peculiar interest to enforce the infliction of the penalties for its violation.

In support of those objections, the Respondent cited the following authorities: *Hume on Crimes*, vol. iii. pp. 185 and 198; *Squire v. Steel*, Fac. Coll. 10th Aug. 1765; *Darby v. Love*, 10th Feb. 1796.*

In reply to the first objection the Appellant cited the cases of *Ritchie v. Sievwright*, 4th Feb.

* The two last were cases of prosecutions for fraudulent bankruptcies, at the instance of trustees for creditors. See *Syme v. Murray*, 19 January, 1810, where a complaint was instituted under the act 16 Geo. 2. c. 11. s. 26. which regulates the conduct of returning officers at elections in Scotland, and provides, that if the common clerk of a borough shall refuse to sign and seal a commission to the person elected a commissioner to serve in Parliament, by the majority of the magistrates, and town-council, or shall sign and seal a commission to any other person, he shall forfeit 500*l.* sterling to the commissioner elect, to be recovered (s. 43. by summary complaint before the Court of Session, upon thirty days notice to the person complained of, &c.); and shall also suffer imprisonment for six months, and be disabled to hold the office, &c.

The Court at first refused to sustain the complaint, as not having the concurrence of the Advocate-General. The complaint was ultimately sustained, but only so far as related to the pecuniary penalty which was awarded to the complainer. See *Burnett's Treatise on Various Branches of the Criminal Law of Scotland*, p 506, note.

1786; *Murray v. Suter*, 9th July, 1793; * *Hawthorn v. Fraser*, 14th Dec. 1799; and *Sellar and Thomson v. Duff and Bain*, 11th Feb. 1809; in all which cases the complainers were private parties, procurators, or litigants, in the courts in which the accused persons illegally united the characters of clerk and agent, and they prosecuted exclusively on their own title, without the concurrence of any public prosecutor.

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With regard to the *second objection*, the absence of any *legal interest* to prosecute on the part of the appellant, the cases, *Ritchie v. Sievwright*, *Hawthorn v. Fraser*, and *Sellar v. Duff and Bain*, were again cited for the Appellant. In all *those cases* the complainers were merely *procurators* or practitioners in the courts where the illegal combination of offices had taken place, without any pretence of peculiar interest in the observance of the Act of Seiderunt, or of peculiar injury by its violation. In the case of *Sellar and Thomson v. Duff and Bain*, where the title was contested, the objection was founded upon the very circumstance of the complainers *being procurators and not litigants*, under which last character it seems to have been admitted as indisputable, that any party had a title to complain. In that case the complainers do not seem to have had that secondary interest arising from a professional connection with the clients against whom the parties accused acted as agents, as it appears from the pleadings in that case, “that they (the

* Not reported.

1819. "complainers) did not state directly, that they
 "were employed as agents in the causes in which,
 MACKINTOSH "as they alleged, the Respondents acted as
 v. "agents."
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Yet, in that case, all objections to title were repelled.

The case of *Murray v. Suter*, decided on the 9th July, 1793,* was also cited. There the complainer, founding his application to the court on the Act of Sederunt, was a private *litigant without any concurrence of a public prosecutor*.

The Respondent in that case urged "that the complainer had no interest in the matter, because he was not a procurator." But the Court found the complainer entitled to *damages* and *expences*, and besides inflicted a fine on the Respondent.

On this second point was also quoted *Hume on Crimes*, vol. i. p. 188.

On the 9th of March, 1815, the following judgment was pronounced in the Court below :

"The Lords having advised this petition and complaint, with the answers thereto, replies and duplies, find, that the complainer has not shewn any title to insist in this complaint, therefore they dismiss the same."

The Appellant brought the question again under the view of the Court by a reclaiming-petition, upon considering which, with answers for the Respondent, the Court adhered to the interlocutor

* Not reported.

complained of, whereupon this Appeal was brought.

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For the Appellants—*Mr. Wetherell* and *Mr. Bligh*. For the Respondents—*the Solicitor General* and *Mr. W. Murray*.*

For the Appellant, upon the two first points, the argument was to this effect. The law, as declared by the Act of Sederunt, seems to contemplate a civil remedy as well as a penal infliction : for the word damages is used together with the word penalties.† For the public security, both by the common law, and by the declaration of the Court, judges are prohibited to act as agents in any cause depending in their courts. This prohibition must have arisen from a well grounded apprehension of the propensity which judges infected with the zeal of agents must naturally feel to favour their clients. The characters are wholly incompatible. Suppose that in this or any other case no injury to the party could be proved, should it depend upon the accident, whether the party in the cause suffered injury, to give a character of criminality to an act which the law has positively forbidden and noted as criminal. Such a construction is contrary to the analogy of all penal laws. The object of this law is

* The question was decided both in the inferior and Appellate Court, upon the ground that the Appellant had no title to pursue, and could not proceed without the concurrence of the public prosecutor. The facts, therefore, and arguments upon the other points of the case, became immaterial, and are omitted.

† See *Syme v. Murray*, *ante*, p. 276.

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to preserve purity in the administration of justice ; the penalties, therefore, ought so to be directed and enforced as to deter a judge from placing himself in a situation in which he may be tempted to act partially, and violate the great duties of his office. When a judge becomes an agent in the cause, he must betray either his client or his oath. According to the construction now attempted, the law is supposed to be merely remedial, giving a private compensation to each individual suitor who might be injured, if he should, by good fortune, be able to prove the fact ; and the reparation, upon this hypothesis, ought to be a payment to the party according to the amount of the injury. . But here is a solemn regulation of law made to secure the impartial administration of justice : ought this to be reduced in practice to 'a mere private remedy, by which a party injured might seek a reparation in damages at his peril ? That the public prosecutor is not a necessary party, appears by the cases cited in the Court below.* And although in some of these cases, procurators acting in the same court with the offender were the prosecutors, it is a libel on jurisprudence to imagine that such a law was made, not for the important and obvious purpose of preventing partiality and corruption in the seat of justice, but for the trifling or pernicious object of protecting agents and procurators against competition ; that is, for the purpose of aiding a monopoly.

On the part of the Respondents it was argued—

* See *ante*, pp. 276, 277, and the note p. 276.

1. That the Appellant, having suffered no injury, could not have title to prosecute. 2. That if the Appellant had such title, the proceeding ought to have been in the name of the Advocate-General as public prosecutor: that the Act of Sederunt was only declaratory of a pre-existing law: that malversation was the offence contemplated by the Act of Sederunt. That in the case of Sievewright he was found guilty of malversation. Here was only one act charged of an equivocal nature, refusing to give time for the Appellant to appear at the proof under the commission. That might have been properly refused. The proceeding is of a criminal nature, and the party ought to have proceeded in the name of the Advocate-General.*

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* In England, all criminal proceedings are in the name of the King, but at the suit and under the direction of a private party. In cases of oppression, or a double proceeding, application may be made to the Attorney-General, and he, if he thinks fit, may direct a *nolle prosequi* to be entered on the roll, by which the proceedings are suspended. How far this is a discretionary power in the Attorney-General, and how far in particular crimes the undue exercise of discretion is controlled by the right of appeal, or other checks, are questions of great interest, but too large to be discussed in a note.

In Scotland, it seems to be held that no indictment can be sustained by a private party, without the concurrence of the King's Advocate. But it is said to be understood that the concurrence cannot be refused, and that the Advocate may be compelled to give it (how is not stated) in all cases where the complaint of the private party is founded on a known and relevant *point of dittay*, and as to which he has, *primâ facie*, a title to insist. It is allowed on the other hand, that the King's Advocate may refuse his concurrence in cases of an opposite description. See Burnet's Treatise on, &c. p. 306. The King's Advocate, according to this

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The Court of Session has in some cases assumed a jurisdiction; * but the offence is of a public nature. The proof must be of malversation by acting at the same time, in the same cause, as judge and agent. In the commissions of oyer and terminer, &c. in England; practising barristers are included, and often try causes.

Reply. In such case they have nothing to do with the cause as counsel or agents.†

doctrine, must exercise a discretion. How it is to be controlled, or what appeal there may be against his decision, except by impeachment, quære. It is, however, more distinctly stated by the same author, that the King's Advocate cannot suspend the prosecution by a *nolumus prosequi*. To do so (and in proper cases to refuse his concurrence) is manifestly a denial of justice. See Burnet, p. 298.

* In the case of A. Ritchie, 29th June, 1798, upon a complaint against printers for giving a false account of proceedings in the court, concluding for damages to the complainer, and stating the offence as *derogatory to the dignity of the court*; it was said that the vindication of the Court belongs exclusively to the Advocate-General, or the Court itself; and the complaint was dismissed upon this among other grounds. See Burnett, p. 302.

† In the Court below, the case of Murray was cited on behalf of the defender; and on the part of the pursuer it was further argued, that the concurrence of the Advocate-General was not necessary, because the purpose of the proceeding was merely to enforce an Act of Sederunt published by the Court; and although this act may be merely declaratory of the former law, still it is the duty of the Court to enforce it. The judges undermentioned delivered their opinions to the following effect.

Lord Glenlee.—The Act of Sederunt is applicable only to permanent judges; if it were otherwise, the inconveniency would be great. If it were applicable to occasional substitutions, what could be done in case of sudden emergencies, disqualifications of ordinary judges, &c.; for who else than a procurator so fit to be appointed? It must be a man of business; and a more proper person could not be chosen. And I believe this to be the uni-

*Lord Redesdale.**—This is a question whether the Court of Session have done wrong in deciding

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versal practice. If he carried on business during the subsistence of such substitution, and in a process against the Complainer, then his title to complain would be undoubted; but this did not happen: and besides, I see no injury has been suffered; I am, therefore, inclined to dismiss the complaint.

Lord Robertson.—I agree, with regard to doubts on the title, with Lord Glenlee. The law of Scotland knows of no popular action against a judge. I agree also with his Lordship in thinking that the Complainer has no title; he must qualify an interest peculiar to himself: no such title, however, is alleged; he has no more than any other inhabitant of the county. And as to the case of Sellar, I have even very great doubts on the title of the Complainer, in that case. As to the merits, however, I differ from Lord Glenlee. There can be no doubt that substitution, granted merely for routine business, as signing warrants, &c. would not fall under the Act. But the substitution here complained of is of a very different nature; it is so broad, that if Mr. Gilzean were in any way incapacitated, the Defender may act; and it is *not at this moment recalled or resigned*. No man can act as judge and procurator in the same court; and, therefore, were the question to rest on the merits, I should be inclined to entertain the complaint; but only to the effect of giving the most lenient sentence, and should only go the length of the mere strict letter.

Lord Bannatyne.—The competency depends much on the fact. The Complainer has shown no action of his, wherein the defender acted both as judge and procurator; and there is nothing in the commission to prevent his also acting as procurator. The Court can take cognizance in the shape before us; they can do so at any time, *ex officio*. The Complainer has shown no title to complain; and I am, therefore, for dismissing the complaint.

Lord Justice Clerk.—On the title, I am clear that the Complainer has a good one. I am not in the least moved, as to the case of

* The Lord Chancellor was absent on account of illness. The Chief Justice of the King's Bench sat in the House during the hearing of the Appeal.

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that there was no title in the Appellant. That Court cannot make an act criminal which is not so by the common law of Scotland. The Act of Sederunt recognizes the common law as the foundation of their Act, which made the law more public ; and it is again recognized more fully in

Murray, which related to statutory penalties. This Complainer only meant to enforce your Lordships' Act of Sederunt. There is no distinction *as to the party complaining, whether litigant or procurator*. The party here complaining has a positive interest, and is, undoubtedly, entitled to complain, and has fully more interest than a procurator. It gives me a good title to complain, if a judge shall act against me in any cause, in the same court, because of influence, &c.; and he has, therefore, as tangible a title as can be conceived. The case of Murray, alluded to, does not apply. On the merits, the question is, Has there been a violation of the Act of Sederunt? There is no doubt that the great object of the Act was to affect the existing and permanent judges. It would be an odious practice, in any process depending before a court, to permit the judge, in any case, to act *as agent*. The question here is, whether this substitution be within the scope of the act. Now I agree with Lord Robertson, that *this is not a limited substitution, but a general one*, enabling Mr. Mackenzie to act in every case, in certain circumstances, viz. absence, indisposition, or disqualification. Now this word, "disqualification," is very important in judging of the nature of the substitution ; for the permanent substitute may even now be in that predicament, in a process at his own instance, or in behalf of the numerous constituents for whom Mr. Gilzean acts ; so that Mr. Mackenzie will be entitled to judge in cases, even after Mr. Gilzean's return ; and I am, therefore, clear that the substitution is neither *sopite* nor recalled ; at least, of recall there is no evidence. Is this decent? I am not prepared to say that the Complainer is not entitled to have the substitution recalled ; being clearly within the spirit of the act. If a special substitution be necessary, it should not be given to an agent.

However, I conceive, that if the complaint is to be entertained, the slightest possible judgment should be given.

one of the cases which have been cited. The Act of Sederunt prohibits inferior judges to act as procurators, or agents, before their respective courts; and considering it, as they by their act declare it to be, an abuse, “*contrary to law, and subversive of the impartial administration of justice, for any judge to act as procurator, or agent, in any cause depending before his court, and having observed that such illegal and improper practices had prevailed in some of the inferior courts, and might prevail in others; to prevent such abuse in time to come, they strictly prohibit all sheriffs substitute from acting, directly or indirectly, before their several courts, in any cause depending before them.*”

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Whether the act done by Mr. Mackenzie comes within the prohibition, is not now to be discussed here; because the Court below have only considered the question, whether the Appellant was intitled to sue. In the cases cited, the Court does seem to have acted on petition and complaint, without the concurrence of the public prosecutor. But in all those cases, the Court acted under circumstances which brought the matter before them *quasi ex officio*.

It is not customary, in proposing to affirm a judgment, to go, at large, into the reasons for affirmance; and, unless some Lord differs from me, I shall propose to find that the decision of the Court of Session is not wrong, finding, as I do, that the judges of the Court of Session, having the cases before them, have paid no regard to them. I agree that the appointment of a person, known

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to be acting as agent, to be sheriff's substitute, was highly improper. It is a practice which ought not to be continued. It may lead to great inconveniences, to speak of it in the mildest terms. But as all the judges agree that if the complaint had been entertained, they should have inflicted a slight punishment, it is not worth while to reverse the judgment.

There is, however, so much in the case, that I cannot recommend to the House to give costs for Mr. Mackenzie, although, by this judgment, he is absolved.*

* By the act 20 Geo. 2. c. 43. for abolishing heritable jurisdictions in Scotland, the appointment of sheriffs of counties and stewartries, heritable, or for life, and their jurisdictions, &c. was taken away from subjects, and resumed and annexed to the crown; and by sect. 29. it was enacted, that there should be but one sheriff or stewart depute, in each county, &c. in Scotland, to be appointed by the King, after seven years from the date of the Act, *ad vitam aut culpam*; and to every such sheriff depute is given power to appoint one or more sheriffs substitute to act during his pleasure.

The sheriffs depute and their substitutes have, by the law of Scotland, very large jurisdiction, both civil and criminal, including the trial of almost every species of crime, and of the most important civil causes. See *Ersk. Inst.* b. i. t. 4. ss. 3, 4, et seq.

The rule, therefore, which prohibits their acting as agents, is of much greater importance than in England, where the sheriff has a very limited jurisdiction. But even here the law has provided (1 Hen. 5. c. 4.), that no under-sheriff, sheriff's clerk, receiver, or bailiff, shall practise as an attorney, in the King's courts, during the time when he is in office with any sheriff.

This statute is evaded by practising in the name of other attorneys, or by putting in sham deputies as nominal under-sheriffs; a practice which excited the indignation of Dalton. See *Blac. Com.* i. 345.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

Major General JOHN HUGHES,
and Sir HEW DALRYMPLE } *Appellants.*
HAMILTON, Baronet

WILLIAM GORDON, Esq. of Milrig. . *Respondent.*

THE sale of a superiority* of a forty-shilling land, of old extent, with warrandice, does not necessarily imply a warranty of a freehold qualification.

In an action where the summons concludes for peaceable enjoyment of lands sold, with warrandice, or damages, in case of eviction, it is in form and substance an action upon the warrandice; and unless the pursuer proves that he is evicted of something expressed, or necessarily implied, in the warrandice, he cannot recover in that form of action.

An offer, by the defender, to meet the plaintiff in another action, if he amends his pleading, is not a waiver of the form.

A conveyance, referring to letters of a preceding treaty, but not specifying what letters, is too uncertain to incorporate the letters, and make them part of the final contract.

Such letters cannot be used in evidence, to explain the contract, by showing what was intended to be part of the sale and purchase, although not expressed in the conveyance.

THE Appellant was proprietor of the estate of Milrig, held of the crown, and estimated a 60s. land of old extent. The Appellant entered into a treaty with Mr. Charles Stewart, writer to the signet, who acted for the Respondent for the sale

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* For explanations of the nature of superiorities, and of the old extent, and the amount sufficient to confer a freehold qualification, &c. see the case of *Geddes v. Stewart*, and the notes, *ante*, p. 164, *et seq.*

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of Milrig ; and the parties having at last come to an agreement for the sale of this estate, with the exception of the superiority of a part called the twenty-shilling land of Millside, regular instruments of obligation of feu of the part of which the superiority was to be retained, and disposition of the remaining part, were duly executed by the Appellant, and also by Sir Hew Dalrymple Hamilton and John Barnes, Esquire, now deceased, as trustees for Mrs. Hughes, whose provisions under marriage contract were secured upon the estate of Milrig. The instrument of agreement or obligation is in these words : “ Know all men by these
“ presents, that I, Lieutenant Colonel John
“ Hughes, of Milrig, heritable proprietor of the
“ lands and others underwritten, with the special
“ advice and consent of Sir Hew Hamilton Dal-
“ rymple of Bargany and North Berwick, Baronet,
“ and John Barnes of Lansdowne-place, in the
“ county of Middlesex, Esquire, trust-disponces
“ of me the said John Hughes, conform to dispo-
“ sition by me in their favour, in trust for behoof
“ of Mrs. Hamilla Hamilton, my spouse, and the
“ other purposes therein mentioned, dated the
“ 22d July, 1802, upon which they stand infest,
“ conform to instrument of sasine, dated 1st, and
“ registered in the general register of sasines, the
“ 15th September thereafter ; and we the said Sir
“ Hew Dalrymple Hamilton and John Barnes, for
“ all right which we have to the lands and others
“ underwritten, at present or upon the decease of
“ the said John Hughes, in virtue of the foresaid
“ disposition and infestment, considering that by

“ *missives of sale of different dates, I the said* 1819.
 “ John Hughes sold to William Gordon, Esquire, HUGHES AND
 “ some time senior judge at Arnee in the East HAMILTON
 “ Indies, *the forty-shilling land of Milrig, and* V. GORDON.
 “ *twenty-shilling land of Millside of old extent,*
 “ with the teinds and pertinents at the price of
 “ 13,125*l.* sterling, by which missives it was
 “ agreed that I the said John Hughes should
 “ retain *the superiority of the said whole lands,* in
 “ which I stand publicly infest until Michaelmas
 “ 1808, at which time I became bound to denude
 “ *of the superiority thereof,* excepting the twenty-
 “ shilling land of old extent of Millside, so far as
 “ regards the superiority thereof which was to
 “ remain in my person, and the property thereof
 “ was to be held feu of me and my successors; and
 “ whereas the parties hereto have of even date
 “ with these presents executed a feu right and dis-
 “ position of the *said whole lands* in favour of the
 “ said William Gordon for payment of the feu-
 “ duties therein specified, in consideration of pay-
 “ ment of and security for the said sum of 13,125*l.*
 “ as the price of said lands in manner therein
 “ mentioned, and that it is proper we should
 “ grant the obligation underwritten, *as to the*
 “ *superiority of the said forty-shilling land of*
 “ *Milrig;* therefore we hereby bind and oblige
 “ ourselves, for our several rights and interests
 “ foresaid, and our heirs and successors, at and
 “ against the term of Michaelmas, 1808, to make,
 “ execute, and deliver to the said William Gordon,
 “ his heirs or assignees, at our expence, a formal,
 “ valid, and effectual disposition in his and their
 “ favour, of *all and whole the said forty-shilling*

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*“ land of Milrig of old extent, comprehending as
“ parts of the same, the lands of Milrig-hill, with
“ houses and pertinents of the same, excepting the
“ privilege of pasturage on the common of Galston,
“ lying within the barony of Riccarton, bailiary of
“ Kyle-stewart and shire of Ayr, as the same are
“ described in the public rights of said lands ; which
“ disposition shall contain procuratory of resigna-
“ tion, precept of sasine, clause of absolute war-
“ randice on the part of me the said John Hughes,
“ and from fact and deed on the part of us the
“ said trustees, with an assignation to the clause
“ of warrandice in the trust deed in our favour,
“ assignation to writs and evidents, and to the feu
“ duties and casualties of superiority and other
“ clauses in common form ; and also a clause ex-
“ cepting from said disposition, the feu-right of
“ the said forty-shilling land and others, as con-
“ tained in our foresaid feu disposition in favour
“ of the said William Gordon ; which disposition
“ shall be so granted by us at the term foresaid,
“ under the penalty of 100*l.* sterling to be paid by
“ us to the said William Gordon, or his foresaids,
“ in case of our not granting the same, over and
“ above performance.”*

The feu right* and disposition of the superiority are agreeable to this obligation. The disposition is in the names of the same parties, and after reciting the obligation it proceeds : “ Therefore we
“ have sold and dispoⁿed, as we do hereby, for all
“ right we or any of us have or can pretend in the
“ premises, sell, alienate, and dispoⁿe from us

* The statement of this instrument is omitted, as being immaterial to the point in question.

“ our heirs and successors, to and in favour of the
 “ said William Gordon, his heirs and assignees
 “ whomsoever, heritably and irredeemably all and
 “ whole *the forty-shilling land of Milrig of old*
 “ *extent, comprehending as parts of the same the*
 “ *lands of Milrig-hill, with houses and pertinents*
 “ *of the same, excepting the privilege of pasturage*
 “ *on the common of Galston, together with the*
 “ *teinds, parsonage, and vicarage of the said lands*
 “ *lying within the barony of Riccarton, bailiary of*
 “ *Kyle-stewart, and shire of Ayr, together with all*
 “ right, title, and interest, claim of right, property,
 “ and possession, as well petitory as possessory,
 “ which we or any of us, our predecessors,
 “ authors, heirs, and successors have, had, or can
 “ anyways claim or pretend thereto, in all time
 “ coming; in which lands, teinds, and others
 “ above disposed, we bind and oblige ourselves
 “ and our foresaids to infest and seise the said
 “ William Gordon.”

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The procuratory of resignation is conformable to this disposition.

The clause of warrandice is thus expressed:
 “ *Which lands and others above disposed, with this*
 “ right and disposition of the same, and infest-
 “ ment to follow hereon, we bind and oblige our-
 “ selves for our several rights and interests before
 “ written, to warrant to the said William Gordon
 “ and his foresaids as follows; videlicet, I the
 “ said John Hughes oblige myself and my fore-
 “ saids to warrant *the same* to be free of all burdens
 “ and incumbrances, and grounds of eviction
 “ whatever, at all hands and against all deadly as

1819. " law will ; and we the said Sir Hew Dalrymple
 { " Hamilton and John Barnes, as trustees foresaid,
 HUGHES AND " do oblige ourselves to warrant *these presents*
 HAMILTON V. " from our own facts and deeds only ; and further
 GORDON. " we hereby assign and make over to the said
 " William Gordon, and his foresaids, the clause of
 " absolute warrandice contained in the foresaid
 " trust disposition in our favour, excepting always
 " from this warrandice the feu right and disposi-
 " tion before mentioned of the property of the
 " said lands of Milrig and others granted by us to
 " the said William Gordon as aforesaid."

The Respondent, in 1812, for the first time, claimed to be admitted upon the roll of freeholders for the county of Ayr, at their Michaelmas Head Court, held upon the 6th of October, 1812 ; and in evidence of the old extent of the lands upon which his claim of inrolment was made, he produced an extract from the records of Chancery, of a retour of the service of Alexander Nisbet, of Greenholm, as nearest lawful heir of Margaret Nisbet, his mother, *inter alia*, in the forty-shilling land of Milrig, therein retoured to be a forty-shilling land of old extent, expedite before the sheriff of Ayr, on the 25th of December, 1578.

By the titles and documents then produced, the Respondent's qualification, as a freeholder, was held to have been sufficiently established, and he was accordingly admitted to the roll ; but at the meeting for electing a commissioner to serve in Parliament, held upon the 23d of the same month of October, an objection to the Respondent's vote

was stated, 'on the part of Sir Andrew Cathcart, of Carleton, Baronet, founded upon an allegation that the document preserved in Chancery, as the warrant of the record of the retour of the service of Alexander Nisbet, in the forty-shilling land of Milrig, in that office, was not an authentic or probative retour. This objection was repelled by the Court of Freeholders; but a petition and complaint was presented, in the name of Sir Andrew Cathcart, to the First Division of the Court of Session, praying that, upon the ground above alluded to, the Respondent should be found not to have produced proper and sufficient evidence of the old extent of his lands, and that his name should be ordered to be expunged from the roll.

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Of these proceedings the Appellants were ap- Dec. 24, 1812.
prised, by an instrument of protest, in the name of the Respondent, which was immediately followed by the execution of a summons, in an action of warrandice against them. In this action, however, no farther proceedings were taken until after the issue of the complaint, at the instance of Sir Andrew Cathcart, which terminated in a judgment of finding " That Mr. Gordon was not en- March 3, 1813.
" titled, in virtue of his titles produced, to be
" enrolled in the roll of freeholders for the shire
" of Ayr." This judgment appears to have proceeded upon the ground that the registration of the retour, above alluded to in the books of Chancery, was liable to challenge, and that the document exhibited by the clerks of Chancery as the warrant of registration, did not appear to be either an original retour, or a duly authenticated

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copy of such retour. Having been thus removed from his place on the roll of freeholders, until he should be able to establish, by better evidence, the old extent of his lands, the Respondent began to move in the action which he had previously instituted against the Appellants.

The summons, in this action, proceeds upon a narrative of the transactions between the Respondent and Appellants, and particularly upon a recital of the deeds of conveyance executed in favour of the former; consisting, in the *first* place, of the disposition of the whole lands to be held in feu of the granters; *secondly*, of the obligation to convey at a certain subsequent term, the superiority of that part of the lands called Milrig and Milrig-hill; and *thirdly*, the disposition and conveyance of that superiority in terms of the previous obligation. This last is the deed mainly founded on, and from that deed the clause of warrandice, already quoted, is given as the basis of the action. The summons then proceeds to narrate the history of the Respondent's inrolment, and the nature and grounds of the complaint against that inrolment, which was then in dependence; and upon these premises the summons proceeds to aver, that "in the bargain between the said John
" Hughes and William Gordon, for the purchase
" of the said lands of Milrig, it was stipulated as
" aforesaid, that the said William Gordon was to
" have a freehold qualification at Michaelmas,
" 1808, and in terms of the obligation before re-
" cited, and disposition granted by the said John
" Hughes, Sir Hew Dalrymple Hamilton, and
" John Barnes, they, for their respective interests,

“ are liable in warrandice of the said disposition,
 “ and are bound to free and relieve the pursuer of
 “ all risk and consequences of the petition and
 “ complaint before mentioned, and of any decret
 “ or act and warrant to be pronounced in the
 “ same,” &c. The summons concludes alter-
 nately, that the Appellants should maintain the
 pursuer in the peaceable possession of the said free-
 hold qualification, “ or otherwise, and in case of
 “ *eviction* of the said freehold qualification and
 “ right of voting, as aforesaid, by any decret or
 “ act, and warrant, to follow and be pronounced in
 “ the foresaid petition and complaint, the said
 “ defenders ought and should be decerned and
 “ ordained by decree foresaid, to make payment
 “ to the pursuer of the said sum of 1000*l.* sterling,
 “ as the price and value of the said freehold qua-
 “ lification, with the legal interest thereof, from
 “ the date of *eviction*, by any decret or act, and
 “ warrant, to be pronounced in the foresaid peti-
 “ tion and complaint; as also to make payment
 “ to the pursuer of the sum of 500*l.* sterling, in
 “ name of damages, and by way of recompence
 “ for the loss sustained by the pursuer through
 “ the said *eviction*, and *in solatium* of the detri-
 “ ment arising from the loss of the pursuer’s vote
 “ and right of electing at the said election meet-
 “ ing; together with the expences incurred, or to
 “ be incurred, by the pursuer, in the said petition
 “ and complaint,” &c.

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The following defences were stated by the Ap-
 pellants:—“ None of the writings founded on in
 “ the summons of this action have been produced,
 “ and until they are seen, the defenders cannot

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“ know whether by their terms they afford any
 “ ground for the pursuer’s conclusions. From
 “ the pursuer’s own shewing, however, it would
 “ appear that he made a slump bargain of the pro-
 “ perty as well as the superiority of Milrig, and
 “ that no warrandice was undertaken by General
 “ Hughes, that the superiority afforded a freehold
 “ qualification, but only that the superiority truly
 “ belonged to him, which is not disputed, no
 “ *eviction* of the superiority having taken place,
 “ or even been threatened. In point of fact,
 “ General Hughes is conscious that he never
 “ meant to undertake any warrandice of a freehold
 “ *qualification*; and that if such a thing had been
 “ required of him in the course of the transaction,
 “ he would rather have been off from the bargain
 “ than agreed to it. If, therefore, there is
 “ any thing in the writings referred to in the
 “ summons importing such warrandice, it must
 “ have crept in *per incuriam*, and was not *pars*
 “ *contractus* between the parties.

“ As to the other defenders, Sir Hew Hamilton
 “ and Mr. Barnes, nothing is stated in the summons
 “ that can implicate them in the alleged warran-
 “ dice. They are merely said to have warranted
 “ from their own facts and deeds; and as no
 “ breach of this is alleged, they will fall to be
 “ immediately assoilzied and found entitled to
 “ their expences.”

This action came before Lord Glenlee, Ordinary,
 and his Lordship on hearing parties appointed the
 case to be stated to the Court in mutual infor-
 mations.

In the information for the Respondent in the

court below, certain letters of treaty preliminary to the conveyances were offered to prove an obligation by the Appellants to convey and warrant, not only the lands and superiority, or crown vassalage of Milrig, but absolutely a freehold qualification in the county of Ayr. The Appellants denied that these letters were admissible evidence in the case after the execution of formal instruments; and they also pleaded that if they had been admissible, they did not prove the obligation alleged by the Respondent.

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The second division of the Court of Session pronounced the following interlocutor: "Upon report of Lord Glenlee, and having advised the informations for the parties, the Lords repel the defences proponed; find it relevant to diminish the price of the lands, that it was intended by the parties that the lands should entitle the purchaser to a qualification as a freeholder, affording a right to vote at elections; ordain the pursuer to give in within ten days, a pointed condemnation of the amount of diminution of price demanded by him, as well as of the damages concluded for, and reserve consideration of the conclusion for expences till the issue of the principal cause."

Dec. 1, 1814,
signed 2d.
First interlocutor of the
Court appealed from.

In consequence of this interlocutor, various proceedings* took place in the Court below, to ascertain the value of the freehold qualification in

* These proceedings are not stated, because the question which gave rise to them became immaterial by the judgment of the House of Lords upon the preliminary question of right upon the terms of the contract.

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dispute, and the expences incurred by the Respondent in the proceedings against him in the Freeholders' Court and Court of Session, upon the subject of his right to vote and remain upon the roll of freeholders.

Feb. 3, 1816,
signed 8th.
Third interlocutor of the
Court appealed from.

Upon these points the Court pronounced the following interlocutor: " The Lords having resumed
" consideration of the cause, and advised the con-
" descence and additional condescence
" for the pursuer, with answers thereto, decern
" against the defender for payment of 538*l.* 18*s.* 4*d.*
" sterling, as the amount of diminution of price,
" to which the pursuer is entitled in terms of the
" judgment of the Court, with legal interest of
" the same, from and after the 3d March 1813, as
" the date of eviction; also for payment of 167*l.*
" 8*s.* 3*d.* sterling, being the amount of the ex-
" pence incurred by the pursuer in maintaining
" his title as a freeholder against the challenge of
" Sir Andrew Cathcart; find the defenders liable
" in expences, subject to modification, and remit
" to the auditor to report on the account thereof
" when lodged; and *quoad ultra* assoilzie the
" defenders from the conclusions of the libel and
" decern."

Against these several interlocutors an appeal was presented to the House of Lords, and on 23d March, 1819, came on to be argued.

For the Appellants—*the Solicitor General* and *Mr. Lumsden*. For the Respondents—*Mr. Wetherell* and *Mr. Abercrombie*.

Two principal questions were argued.

1. Upon the question as to the admissibility of the preliminary correspondence as evidence on the part of the Respondent, Stair's Inst. Tit. Probation, *Clinan v. Cooke*, Scho. and Lef. Rep. vol. i. p. 22; and *Wiglesworth v. Dallison*, Doug. Rep. p. 206, were cited; and it was compared to the cases of latent ambiguity, where parol and external written evidence has been admitted to explain a deed.* Upon the general question, *Hughes v. Gordon*, decided in the Court of Session before the Second Division in the year 1811, was cited.

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2. Upon the question whether the contract implied a warrandice, it was said the parties agreed to sell and to buy the lands of Milrig, both parties understanding that the 40s. land had the quality of affording Mr. Gordon a title to be inrolled as a freeholder, and both understanding it on grounds equally known to both, viz. the actual enrolment and the title-deeds.

For the Appellants the arguments were thus stated :—

There is no reason to doubt, that *de facto* the crown-vassal in the 40s. land of Milrig had been

* On this point, see *Beaumont v. Field*, 1 Barnewell and Alderson's Reports, 207, which was a case of letters written upon a previous treaty, and admitted to explain a deed.

The deed in that case purported to convey coal mines by a certain description; and there were no mines corresponding to the description. So in this case, if the disposition had professed to convey, or the warrandice had included a freehold qualification by an erroneous or mistaken description, the letters might have been held admissible.

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a freeholder in virtue of his right to these lands, from the very commencement of such freehold rights. The lands had afforded a freehold qualification during the possession by the Appellant General Hughes, since he actually stood enrolled on these lands. It continued for three years and more after the sale and disposition to the Respondent, and till after the Respondent too was enrolled, when an objection was stated. The objection was not that the lands were not truly 40s. lands of old extent, and therefore substantially sufficient to confer title to a vote. But it was this, that the extract of the retour of the lands of Milrig, which purported to be taken from a writing held to be a retour about the end of the 16th century, had now for the first time been discovered to have been taken from a writing of that period, but which was not a regular retour. In this way, the existing evidence of the old extent of Milrig which had supported the vote on these lands from time immemorial, happened on the fourth year of the Respondent's possession of these lands, to be destroyed by an investigation, which the dilatory and imprudent conduct of the Respondent, in waiting for years, till the eve of a general election, before he claimed enrolment, had occasioned.

It cannot constitute a case of eviction or of warrandice, either express or implied, for it is clear that there was no eviction of any subject whatever by any person ; and it is equally clear, that the mere fact of parties believing a subject to have any quality, would not constitute warrandice, even although it never had such quality at all ;

otherwise actions of warrandice would be infinite ;
 for there always are prevalent opinions as to the
 qualities of subjects sold which turn out to be
 erroneous. Far less, however, could a claim of
 warrandice arise, when the subject did possess
 that quality as believed by both parties, and by a
 subsequent accident, which neither could foresee,
 was afterwards found to want evidence to support
 the claim. This is a case of *periculum rei venditæ
 et traditæ*. The subject was sold by the Appellant
 to the Respondent, with a supposed quality,
 without any express warrandice of this quality;
 and nothing was said or done by the Appellants,
 to which the belief of the Respondent that the
 subject was so qualified can be attributed. After
 three years, an accidental discovery is made, and
 the quality perishes. This seems no more the
 ground of claim against the seller, than if a vol-
 cano had burst out from under the lands, or if
 they had sunk into a gulph. Though these catas-
 trophes had been prepared by the operation of
 centuries, yet no claim would on that account
 have existed against the seller, who never could
 be construed to warrant the duration of the sub-
 ject sold, in all its value against innumerable
 accidents. It may be asked where the claim could
 stop? The date of the retour was about the end
 of the 16th century. Since that time the lands
 may have passed through twenty hands, by similar
 bargains. With whom is the responsibility to
 rest? Prescription cannot operate; it never does
 operate in cases of eviction and warrandice, except
 from the date of the eviction or breach of war-

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randice. The claim then must run back to the date of the retour, and be handed from purchaser to purchaser, till it reaches that period. Supposing the lands to have been sold by A. B. in 1599, and that A. B. had heirs at this day, would they be liable in warrandice? Yet on what principle could the burden be laid on any intermediate possessor? Another case may be put:—Suppose the lands had been sold as a forty-shilling land while both the parties understood that there was no vote on them. Suppose then, that a retour had by accident been found, could the Appellant, General Hughes, have brought a claim of any kind against the Respondent? Surely not. The answer would have been, that this was an accession *rei venditæ et traditæ*, to which the buyer was fully entitled; and if the Appellant, General Hughes, had pretended to push his claim, he would have been told, that the lands might have passed through many hands while this capacity of accidental improvement existed, and that he must blame his own bad fortune or negligence that the lucky accident did not happen in his time. But the very same argument applies in the converse case. The retour has accidentally been found to be irregular while the estate is held by the Respondent. It must equally follow, that the Respondent must bear this accidental diminution of value, as enjoy an accidental increase. *Cujus est commodum ejus debet esse incommodum.*

For the Respondent were cited the cases of *Wilson v. the Creditors of Auchinleck*, Nov. 14, 1764, Dict. of Decis. vol. iv. p. 210; (in which

the purchasers at a judicial sale were allowed a restitution of one fourth of the price of the teinds; the whole of which they had bought and paid for with the lands; it having been discovered after the sale that one fourth of the teinds did not belong to the bankrupt, but to the crown :) *M'Lean v. M'Neil*, Fac. Coll. June 28, 1757; (in which it was found relevant to diminish the price of lands, that it was intended by the parties that the lands should entitle the purchaser to a qualification as a freeholder having right to vote at elections *;) and *Edwards v. M'Leay*, Cowper's Rep. p. 308.

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* The facts of this case were thus stated by the Appellant's counsel from the Sessions papers. Two parcels of lands were sold to M'Neil by minute expressly describing *each of them as separately a two merk land of old extent*, and over and above this, it was not only the understanding of the parties, but distinctly expressed between them, that the lands did afford a vote in the county, and were bought with a particular view to that quality. In truth, however, the lands taken together, were only a two and a half merk land, and *for that reason*, did not afford a vote. It was a long time before M'Neil, the buyer, made up his titles. In doing that he found out the fact, and it did not appear possible that the error could have been innocent on the part of the seller. Having found this out, M'Neil appears to have resisted payment of the price, and M'Lean's heir brought an action against him. M'Neil pleaded alternatively, that he was entitled either to rescind the sale or have a deduction from the price; and he aided this plea by very strong allegations, and proofs of wilful deceit in M'Lean. M'Lean's heir, the pursuer, attempted to defend himself, on the plea, that the lands being or not being of four merks of old extent, and affording or not affording a vote, was not in law a valuable or estimable quality. The first interlocutor by Lord Drumore, Ordinary, upon the

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In the course of the argument, Lord Redesdale made the following observations.

merits, is dated Feb. 22, 1754. In it the Lord Ordinary finds "the allegation made by the defender, that it was *actum et pactatum* betwixt him and the deceased Lochbuy and his interdictors, at the time of executing the minute of sale, that they should dispone to the defender such an estate as would entitle him to vote for a member of Parliament in that county, neither competent to be proven by the interdictor's oath, nor relevant to resolve the sale or abate the price, in respect the defender does not qualify any damage he sustains by the want of such vote; and allows the defender's procurator to see the writs produced for instructing that the incumbrances are purged."

This interlocutor was adhered to by refusing a petition for M'Neil, the defender. The defender presented a second reclaiming petition, which was remitted to the Lord Ordinary, (Lord Kames, Lord Drumore having died.) It appears that the pursuer, at advising the last reclaiming petition, had made an offer of taking back the lands. To which the defender's counsel had stated, they were not instructed to make an answer at that time. With this the cause went to the Lord Ordinary. Before the Lord Ordinary the defender's counsel appear to have signified their acceptance of the pursuer's offer; but by this time the pursuer had changed his mind, and refused to adhere to his offer. Upon this the defender again petitioned the Court against the former interlocutor, in respect the pursuer had refused to take back his lands, and because the Lord Ordinary had refused to judge in that matter. This petition was answered. In the answers the pursuer pleaded *res judicata*, and maintained that he had eight interlocutors in his favour, and that the cause was finally decided. Upon this petition and answers an interlocutor was pronounced, which is the interlocutor quoted in the report as a final one. It is in these words: "The Lords find it relevant to diminish the price of the lands; that it was intended by the parties that the lands should entitle the purchaser to a qualification as a freeholder having right to vote at elections." But this interlocutor was *not* final. On the contrary, a petition was presented for M'Lean's heir of this

The objection to the form of proceeding as stated by Lord Robertson, is that the present

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date. The petition was answered. This case was not decided upon this petition and answers; but memorials were ordered upon a point, whether a retour in 1609 shewed the value of the lands to have been four marks. The Appellants have not been able to discover the final judgment. But there appear to have been memorials given in. That for M^cNeil is dated Jan. 5, 1758, and that for M^cLean, Feb. 6, 1758.—The following passages in the papers will shew the nature of the facts and pleadings in the case.—In the answers Aug. 5, 1757, by the defender, M^cNeil, are the following passages:—"Want of qualification implies a fraud on the part of the seller, as he must have known the defect at the time of the bargain; and as this defect existed from the very beginning it could not arise from the purchase, nor could be supplied with regard to the subjects sold.

"The last observation in the petition, that in fact the lands of Ardlussa and Knockintavel, are part of the barony of Moy, which, by an old retour in 1609, is valued at eighty merks of old extent, and that if this old extent was divided, a proportion of four merks would belong to the lands of Ardlussa and Knockintavel, which, as the law stood at the time of the purchase, would entitle to a vote, is clearly founded upon a wilful mistake as to the import of this retour. Though it is true that in the valent, it is said, '*Quod omnes et singula superscriptæ terræ, &c. tempore pacis valuerunt octogentas mercas,*' yet when the particular description of the lands in the retour is adverted to, those in question are thus described: '*Terris duarum mercatorum terrarum et dimidiata terrarum de Ardlussa et Knockintavel in insula de juray;*' so that here the particular proportion of the old extent belonging to these lands is expressly described and specified in the retour."

In the memorial for M^cNeil, Feb. 6, 1758, are the following passages: "In the sequel it shall be made appear that this false description could not possibly have proceeded from error and mistake."

After saying that the lands are falsely described, it proceeds:

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action rests entirely upon the warranty. Whether the objection to the form of proceeding has been

“ For the Defender is now in condition to aver, that from the
“ examination made of all the title-deeds produced for
“ Lochbuy, conceived in favour of his predecessors, from
“ the earliest period down to this day, this description is not to
“ be found in any one of them. They were neither described in
“ any of these title-deeds, as a four merk land, nor as of any
“ old extent whatever. On the contrary, your Lordships will
“ observe, from what is now called the retour 1699, and from
“ another retour in 1615, that they are described to be but a
“ two and a half merk land, without the least mention of old
“ extent ;” “ and therefore the defender must be pardoned to
“ insist that when the aforesaid false description was for the
“ first time assumed in this minute of sale, *res ipsa loquitur*,
“ these false colours were hung out purposely, and of design,
“ to deceive and impose upon the defender, and to induce him
“ to give so much a higher price, upon the supposition that,
“ being truly of that extent, they entitled to the qualification of
“ a freehold in the county.

“ And that this must have been the case will further appear
“ to your Lordships, from the disposition granted by John
“ M’Lean of Lochbuy to Lauchlan M’Lean his son, no farther
“ back than the 18th of Jan. 1733, of the whole lands and
“ barony of Lochbuy, which was but four years prior to the
“ minute of sale, in which disposition the lands of Ardlussa and
“ Knockintavel are especially described as a two and a half
“ merk land, without the addition of old extent. And it is from
“ hence submitted to your Lordships, what possible excuse
“ can be offered for so material a variation in the description of
“ these lands assumed by the said John and Lauchlan M’Lean
“ in the minute of sale, 1737 ?

“ But neither is this all. It further appears, that the same
“ Lauchlan M’Lean in the year 1742, which was but five years
“ posterior to the minute of sale, did execute a disposition to
“ these very lands to himself in life-rent, and to Hector M’Lean
“ his son in fee, under the description of the two and a half

waived by the defender's answer to the information, is a question to be considered. If that

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"merk land of Ardlussa and Knockintavel, without the addition of old extent; and the after titles to these lands are made up under this last description. So that, from first to last, except in this single instance of the aforesaid minute of sale, these lands had never received, in any one of the title-deeds, any other description, but that of a two and a half merk land, without the addition of the words of old extent. How then this description came to be varied in the minute of sale, and these lands to be therein set forth and described as a four merk land of old extent, will require some better apology than has yet been attempted, to induce a belief that this was not done of design and intention to increase the value and price of the lands at the sale."

From these passages, and from the interlocutors coupled with the defective report, it was contended to be quite clear, 1mo. That there was a deficiency of a subject expressly mentioned in the minute of sale, i. e. conveyed and warranted in the minute of sale, viz. *the old extent* of the lands; and that it was in consequence of this deficiency the lands did not afford a vote. 2do. That there were strong allegations and apparent evidence of wilful deceit by the seller. 3tio. That after all it does not appear that the claim of M'Neil was ultimately sustained.

In the court below, and slightly also in the arguments upon the Appeal, a point of Scotch pleading was discussed, viz. whether the *actio quanti minoris*, i. e. for compensation or reparation in damages, on account of a latent insufficiency or defect of the subject of purchase can be sustained, except in cases of fraud.

For the Defender upon this point, the cases of *Hanway*, 26th Jan. 1785, and *Hughes v. Gordon*, 1811, were cited. For the Pursuer, the following authorities were cited: *Stair*, i. 9, 10. b. i. 14. 1.; *Bank*, i. 9. 2. i. 11—15.; *Ersk.* iii. 3. 10. as explained by iii. 3. 9.; 23d June, 1757, *Macneil v. Maclean*; 26th Jan. 1785, *Hannay v. Creditors of Bargally*; 13th Feb. 1782, *Lloyds v. Paterson*; 23d Jan. 1801, *Gray v. Hamilton*. It was also argued, that the Appellant, the Defender in the

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were decided in the affirmative, a further question arises, viz. whether there is in the disposition a sufficient reference to incorporate the letters, and enable the Respondent to proceed upon them. The letters undoubtedly import, that in the contemplation of the parties, the property carried a freehold qualification. That could hardly be otherwise; for the vender was then a freeholder entered and standing upon the roll.

Upon the question as to the form of action, it is necessary to attend to the words of the conclusion of the summons; "or otherwise, and in case of eviction, &c. to pay the price, &c. and damages of 500*l*." The satisfaction in value is claimed distinctly for eviction, and the damages also for injury sustained by eviction.

The information for General Hughes objects to the form of action. The Respondent is thereby challenged to amend his pleading in order to raise the question; but he has made no amendment.

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At the conclusion of the arguments, *Lord Redesdale* delivered his opinion to the following effect:

The first interlocutor finds it relevant to diminish

Court of Session, had waived the objection to the informality of the pleading, by a passage in his information, by which he submitted, that "If the Court should be of opinion that the Pursuer was intitled, without any amendment of his libel, to change entirely the grounds of his action, and to substitute an action *quanti minoris*, for an action of warrandice, the Defender was ready to meet him."

See the argument and the opinions of the judges, *Fac. Coll.* June 15, 1815.

the price of the lands; that it was intended, by the parties, that the lands should entitle the purchaser to a qualification as a freeholder, affording a right to vote at elections. The second interlocutor decerns, that the defender (Appellant) is to pay —*l.* as the amount of diminution of price, to which the pursuer (the Respondent) is entitled, with interest, expenses, and costs. The proceedings in this case were founded on a transaction between General Hughes and Mr. Gordon for purchase. After much correspondence, they came to an agreement, and conveyances were executed in pursuance of the agreement. The form of action is unquestionably of warrandice. The summons, reciting the agreement, states that it was carried into execution, by conveyances, (for the sum of —*l.*) of the lands of Milrig, &c. with absolute warrandice, on which the pursuer was infeft. The obligation proceeds upon the narrative, that it was agreed Hughes should retain the superiority until Michaelmas, 1808, &c. Two dispositions were made, because the lands were immediately conveyed; but as to the superiority, part was to remain with the Appellant, and other part was to be conveyed to Mr. Gordon; and it was understood that the superiority would convey the right of voting. The procuratory of resignation is consonant to the previous disposition, and the clause of warrandice is thus expressed: “Which
 “ lands, and others above disposed, with the right
 “ and disposition of the same, and infeftment to
 “ follow thereon, we bind and oblige ourselves, for
 “ our several rights and interests before written, to
 “ warrant to the said William Gordon, and his

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“foresaids, as follows, videlicet, I, the said John Hughes, oblige myself and my foresaids to warrant the same to be free of all burdens and incumbrances, and grounds of eviction whatever, at all hands, and against all deadly as law will : and we, the said Sir Hew Dalrymple Hamilton and John Barnes, as trustees foresaid, do oblige ourselves to warrant these presents from our own facts and deeds only ; and further, we hereby assign and make over to the said William Gordon, and his foresaids, the clause of absolute warrandice, contained in the foresaid trust disposition, in our favour ; excepting always from this warrandice the feu right and disposition before-mentioned of the property of the said lands of Milrig, and others, granted by us to the said William Gordon, as aforesaid.” The summons proceeds to state that Gordon was infest ; and that an extract of the retour was delivered among the title deeds. The right of voting was not made out by Mr. Gordon, and his name was expunged from the roll. He had called on Hughes to appear and defend him from eviction. The summons concludes that defenders are liable in warrandice, &c. ; that the value of the freehold qualification is 1000*l.* and concludes also for damages, all which is required, in consequence of the warrandice of the disposition being incurred. The summons demands that the defender should maintain the pursuer in peaceable possession, or otherwise ; and in case of eviction, should be decerned to make payment of — *l.* by way of compensation. I have stated this summons of warrandice at length ; because it is important to be considered

whether this is to be taken as an action principally on warrandice, or of two descriptions, on warrandice, and for damages. It appears to me, following the opinion of one of the judges in the Court below, that the action rests on the warrandice; and the question is, whether any thing has been evicted. It is admitted, that the Respondent has the superiority; and the complaint is, that he has no vote. But the warrandice is not of the vote; and you cannot go beyond the disposition. It is said, indeed, that the disposition has reference to the missives on which it is founded; but, although it refers to the missives, it *does not specify* what missives. The question now is upon the disposition of the superiority,* The obligation is the foundation of the warrandice in the disposition, and in that, there is no reference to the missives. But suppose the missives were referred to in the obligation, the introduction of the mere words "missives" would not give a construction to the deed, although it might give a right to have the deed reformed, or of action upon the case, on the ground of fraud, or misrepresentation, if that could be made out. As to the correspondence, if it were admissible, there is the proposal of sale; the answer requiring particulars, and whether there was a freehold qualification, &c. the reply, that it has a vote, and undoubtedly here is a representation; but it is not clear that this was the subject of final agreement. For after this, it appears there was an end of the treaty upon the terms proposed. Afterwards,

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Here the Noble Lord read the letters, which are omitted as immaterial.

* See pp. 290, 291.

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This fact appeared by the correspondence.

a new proposal, as to price, is made by the Respondent's agent, which is accepted, on the terms that Gordon should take the lands as they stood. These letters I have stated to show how dangerous it would be to admit, in actions of this kind, such evidence. How does it appear, if Hughes had been called on to warrant the vote, that he would not have said as he did, with respect to the admeasurement of the lands; I will not warrant, you must take it as it stands. It is highly dangerous to admit such evidence to explain a deed, unless there is fraud or misrepresentation to afford a ground. The question is, therefore, whether upon a deed, which does not express warranty of the vote, it can be held that the Appellant is bound. The action proceeds upon the supposed eviction of something contained in the warranty. Nothing, as to the right of voting, is contained therein; nor is it necessarily, *incident* to the subject thereby disposed. Before the statute of 1681, the right was confined to a forty-shilling land of old extent; and where that is the ground of claim the statute of 16 Geo. 2. requires proof by retour of old extent, of a date prior to the statute, 1681. On the part of Respondent, it is contended that, by reference to the missives, the deed contains the grant of a right of voting; but the authorities cited from the laws of Scotland, and of England, do not, in any degree, sustain the argument. As to the case of *Wigglesworth v. Dalison*, where by the custom of the country a way-going crop was allowed to the tenant for years, that was an action of trespass, which was met by a plea of title

Wigglesworth v. Dalison, Doug. 196. Whether a right decision in all its parts, Quære.

and custom; and there may be a question, whether that decision is right in all its parts. The Court held, that a general custom, applicable to lands, gave a construction to the deed. The real state of the case is, that where custom warrants a way-going crop, unless the tenant has the way-going crop, he has not, in effect, the land for twenty-one years. When a transaction is concluded by solemn deed, that settles the right between the parties; and unless there be misrepresentation, knowingly made by one of the parties, the legal and technical import of the deed must prevail. As to the case of *Clinan v. Cooke*, rightly understood, it is an authority against the Respondent. If this had been the case of a lease executed, it must have stood according to the terms expressed, unless reformed for fraud or misrepresentation. There is nothing here to connect the deed with the correspondence.

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1 Scho. and
Lefr. Rep. p.
22. See the
note next page.

The form of action being on a warrantice, the question is, whether the thing described in the warrantice is evicted. As to the conclusion, with the claim of damages, it cannot warrant a total departure from all forms of action.

As to the waiver alleged, the expression is, If you amend, I shall be ready to meet, &c.; but this, I think, is no waiver. Lord Robertson says, the action appears to rest entirely upon the warrantice. If the Respondent wished to have the right of voting warranted, he should have taken care to have had it so expressed in the disposition. The summons contains no conclusion for damages, but in respect of the eviction of the thing war-

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p. 307.

ranted. The judgment is upon an action *quantum minoris*, if it can be sustained in such a case ; not a judgment on the warrantice. It is founded upon the supposed previous contract between the parties. The case of *Edwards v. M'Leay*, which was cited from Cooper's Reports, was decided on the ground of a misrepresentation, or else the deed could not have been affected. It is important to preserve the forms of actions. But if he is advised that he has grounds to maintain such action, the judgment here is not to preclude Mr. Gordon from insisting upon his claim, in a right form of action.

Judgment *reversed*, without prejudice to any relief which in any other form of action the Respondent may be entitled to.

Note. In the case of *Clinan v. Cooke*, (which was decided by Lord Redesdale, when he was Lord Chancellor of Ireland) the Defendant, by public advertisement, had offered lands to let for three lives, or thirty-one years. A treaty took place upon the footing of this advertisement ; and, finally, the agent for the Defendant signed a contract for a lease of the lands to the Plaintiffs : but the term for which the lease was to be made was not specified in the agreement, and as it contained no reference to the advertisement, parol evidence to connect the agreement with the advertisement was rejected ; and the bill, which was for a specific performance of the contract, was dismissed, upon the ground, that the term for which the lease was to be made was unascertained by the agreement.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

WILLIAM MACDONALD *Appellant.*

MRS. ELIZABETH MACDONALD,
 otherwise LILLIE, and JOHN
 LILLIE, of Forres, her Hus-
 band, for his interest.

Respondents.

A LAW agent continuing to act for his client, held responsible for a loss caused by his neglect, although twenty-five years had elapsed since the transaction; notwithstanding a correspondence respecting the loss, in which the client acquiesced without remonstrance; and after a settlement of accounts with the Representatives of the client, and a discharge given by them before they had discovered the facts.

MACDONALD of Finlarig, the father of the Respondent, Mrs. Lillie, employed in the management of his affairs William Macdonald, of St. Martin's, father of the Appellant, and writer to the signet.

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Towards the end of the year 1787, Finlarig wrote to W. Macdonald, expressing his wish that some of his money then lying at a bankers should be laid out on security at five per cent. to his (W. Macdonald's) satisfaction. In April 1788, Macdonald was applied to by another of his clients, Colonel Charles Campbell, of Barbreck, by letter, in the following words :

Circum-
 stances of
 the case.

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“ I have been so harassed and plagued with applications for and from my son Charles, that I have at last agreed to his purchasing Captain Campbell Ederline’s company, which, with my former advances this season raising men, and to enable him to prepare for the voyage, will at least cost 1,600*l*. So unexpected a demand I did not expect, and consequently will oblige me to borrow some money. I do not like the idea of giving any person security if it can be avoided; but I have no objection to lodge a bond of Captain Hector M’Niel’s to me for 1000*l*. in the hands of the person who will let me have that sum, as an additional security with my own bond.”

The letter then noticed some other difficulties in which Colonel Campbell was involved from advances he had been obliged to make, observing that, on the whole, these were “ *dreadful drains*,” and he concluded thus:—

“ I beseech you to get this 1000*l*. business settled without loss of time, and let me hear from you in course of post.”

Upon this application, Macdonald accommodated his client, Colonel Campbell, with 1000*l*. of his other client Finlarig’s money, taking as a principal security for that sum the bond of Colonel Campbell, with an assignment to that of Captain Hector M’Niel, as a collateral security, both conceived in favour of Finlarig as the lender; and on the 19th of May, 1788, Macdonald wrote thus to Finlarig:—“ I have lent another 1000*l*. of your money at this time, on very good

“ security, to Colonel Charles Campbell of Barbreck.”

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The *security* intended by this expression, appears from an entry in Macdonald's books to Finlarig's account, of which a copy by way of account current was sent to Finlarig in December, 1788, having this article :—

“ To Cash lent Colonel Charles Campbell of Barbreck, on your account, on bond and assignation to Captain Hector M'Neil of Ugadale's bond for 1000*l*.”

It appeared afterwards that Macdonald, the agent of Finlarig, did not complete the right of his principal to Captain M'Neil's bond, by giving intimation of the assignment to M'Neil, the obligor and debtor, according to the law and practice of Scotland.

In May, 1789, Colonel Campbell and Captain Hector M'Neil granted their joint bonds to three different persons for 1000*l*. sterling each ; and of the same date, Colonel Campbell granted a bond of relief or indemnity to Captain M'Neil, on the recital of these three bonds, stating that the money was received by Colonel Campbell, and wholly applied to his use ; and that Captain M'Neil had become bound in the said securities at his, Colonel Campbell's desire, and for his account, and therefore engaging to indemnify Captain M'Neil, or to pay the money to him, that he might relieve himself of the said engagement. All these transactions were conducted by Macdonald.

On the 2d of January, 1792, Macdonald, in a letter addressed to Colonel Campbell,

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uses the following expressions. " I had a letter
" lately from my namesake William Macdonald,
" who lent you 1000*l.* some years ago, upon your
" own bond simply, containing an assignation to
" a bond of Captain Hector's for the like sum ;
" and he mentions his intention of sending me the
" bond, as he wants money to, &c. I have been
" thinking of the affair you mention as to Mr.
" Calland's securities, and as I hear of a Mr.
" Turing lately from India, who has plenty of
" money, which it seems he is desirous to lend,
" might you not try Calland, who, I believe, is
" connected with him, and see if he would give
" the money on a conveyance ? What say you to
" this plan, as people here are perpetually at
" *searches of records, the moment you mention heri-*
" *table security, and that is to be avoided on all*
" *occasions.*"

In April, 1792, Colonel Campbell died in a state of insolvency, and his estates were brought to a judicial sale. Captain M'Niel being obliged to pay all the three bonds above mentioned, received from the creditors therein assignments *qua cautioner*, or surety, of their respective debts, for the purpose of enabling him to operate his relief against the estate of Colonel Campbell. On these and the bond of indemnity he was ranked as a creditor, and took a dividend with the other creditors when the estates of Colonel Campbell were sold.

On the same occasion Macdonald, who continued to enjoy the confidence of Finlarig, and the management of his affairs, got him ranked as a creditor on the estate of Colonel Campbell,

by virtue of the Colonel's bond for 1000*l.*, but made no claim on M'Niel.

Pending the action for a sale of Colonel Campbell's estate, and the division of the purchase-money, Macdonald advised Finlarig, from time to time, of what was going forward, representing the Colonel's insolvency as a matter of surprise to himself and every one else, but taking no notice of the collateral security by the assignment of M'Niel's bond.

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Colonel Campbell's death and insolvency had been announced to Finlarig by Macdonald in the following letter :—“The hurry and confusion I have
“ been thrown in by the death of my book-keeper
“ and principal clerk, the one after the other within
“ six months, has engrossed my attention so much,
“ that I am not able to answer letters regularly of
“ late, and prevented me writing you earlier of
“ the death of Colonel Charles Campbell, to whom
“ 1000*l.* of your money had been lent several
“ years ago, when he was in as good credit as any
“ man, possessed of a land estate better than 2000*l.*
“ sterling of yearly rent; but since his death, it
“ turns out that he was greatly in debt, owing to
“ an expensive and extravagant family, and
“ various projects of improvements; for he was a
“ man of no expensive turn himself. However,
“ after a full examination into matters, it is the
“ general opinion, when the estate is sold, there
“ will be no short coming in payment of the cre-
“ ditors, though the interest will not be drawn
“ regularly, at least while the widow lives. This
“ is so far uncomfortable; but as I lent your
“ money on all occasions as I would my own,

Dec. 13, 1793.

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“ misfortune cannot be avoided at times, though
“ it seldom happens ; and even in this instance, I
“ don’t look on it by any means as desperate, now
“ that matters are pretty well understood.”

Finlarig wrote an answer to this letter in the following words : *

Jan. 6, 1793.

“ Dear Sir, I have been favoured with yours in
“ course of post. I observe what you say con-
“ cerning Colonel Campbell ; it is not very agree-
“ able, but it might be worse.”

April 25,
1800.

Of this date, Mr. Macdonald transmitted to Finlarig a copy of his account, accompanied with a letter, in which he says :—“ I have judged it
“ proper to send a duplicate, as then made up, for
“ your examination, having got a frank from Lord
“ Perth for that purpose, and shall be glad to hear
“ from you when convenient, that you find the
“ account right. You’ll observe, that you have
“ just now 2100*l.* lent on the two bonds by the
“ Perthshire trustees, of whom I am one myself,
“ along with Lord Perth, and several others, so
“ that no accident can befall any part of it ; and
“ this, besides the debt due to you, as formerly
“ mentioned, by the estate of the late Colonel
“ Charles Campbell, the recovery of which, or
“ some part of it, must be a distant period before
“ dividends are made to the creditors, till the
“ widow dies.”

May 11, 1802.

In answer to this letter, Finlarig wrote in the following terms :—“ Dear Sir, I was
“ duly favoured with yours of the 25th ultimo,

* It appeared from all the letters of Finlarig that he was a very illiterate man.

*" covering my account; which I have examined,
 " and find perfectly right; and I have great
 " reason to be very thankful to you for the great
 " trouble you have been at, and so many trans-
 " actions which I see by the account, till you got
 " my little matters put out of all danger. Those
 " transactions show very plainly, that I was not
 " forgot, for which I return my most cordial
 " thanks; at the same time I see likewise, that
 " there is nothing charged on your part for
 " trouble, which is more than I have any right to
 " look for; and therefore wishes that you charge
 " me whatever you see proper; for I have it not
 " in my power to make you any recompense any
 " other way. I have been more obliged to you than
 " all the rest of Adam's posterity; and it was a
 " lucky introduction for me, that first brought us
 " together. I observe, that as this is a bad year, al-
 " though the balance in my favour be but very small,
 " that you allow me to draw on you as usual. May
 " God keep you in good health and long life, in the
 " head of your own affairs; and much satisfaction
 " may you have of your family and your fortune,
 " is my prayer towards you," &c.*

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In the month of April, 1802, Mr. Macdonald April 8, 1802.
 transmitted to Finlarig an affidavit to be made by
 him, relative to the debt due from the estate of
 Colonel Campbell, in order to be produced in the
 process of ranking, sale, and division above-
 mentioned. In his letter inclosing this paper,
 Mr. Macdonald says—"Dear Sir, I send you the
 " inclosed affidavit to be made before a justice of
 " the peace, and I fancy you need not go farther

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" than my cousin Tullochgriban to do it, as he will
 " readily oblige you or me so far. You and he
 " will have each page to sign with your names,
 " immediately below the writings; and mention,
 " when you send back the paper, after signing, the
 " place and date of signing, and the shire, so as
 " to be filled up by the same hand. This is a des-
 " perate debt, as I formerly mentioned to you, but
 " it is right to take all that can be got. I never
 " was so much deceived by mankind as by Colonel
 " Campbell, who had a large estate; but his debts
 " have turned out immense in England and Scot-
 " land."

April 15,
1802.

Finlarig returned the affidavit, executed, in a
 letter to Mr. Macdonald, of the following tenor :
 —" Finlarig, 15th April, 1802. Dear Sir, I re-
 " ceived yours, inclosing the affidavit, and I hope
 " that matters is done to your mind. Your cousin
 " Tullochgriban is just such another justice as
 " myself; although appointed for two counties,
 " we never qualified either of us. I have not
 " been well since I was at Elgin, with fever and
 " ague, and have not been out of the house for
 " eighteen days; therefore was obliged to get the
 " justice of the peace to my own house, so that
 " you may date it at Finlarig, 14th instant, in the
 " county of Moray or Elgin, and the justice is
 " for the same county, and Inverness; take your
 " choice. *I am afraid I must call on you for*
 " *money at Whitsunday and Martinmas both.*
 " Those years have ruined us. This is a terrible
 " climate; we could not get a yoke a plough for
 " three days past, with frost and snow; it will kill

"all our lambs; it bids badly for a crop or a
 "good harvest, as they say that the harvest will be
 "like the spring. The justice of the peace is
 "James Grant, Ballintom, in case you should
 "want his designation. I hope all is according to
 "your directions; and with best respects to your-
 "self and family, I remain," &c.

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In the month of April, 1803, Mr. Macdonald April 1, 1803.
 sent Finlarig for execution, a discharge for a
 dividend from Colonel Campbell's estate; in the
 letter accompanying which, Mr. Macdonald says—
 "I now send you a discharge for a dividend from
 "Colonel Charles Campbell's estate, *upon that*
 "*unlucky debt he owed to you upon bond*; and
 "there will be another dividend of less amount
 "very soon, but no more till the death of his
 "widow, when the sum she liferents will also be
 "divided among the creditors, &c. This same
 "sum, small as it is, I had once little hopes of
 "recovering; the Colonel's failure from affluent
 "circumstances being to so great an amount as
 "astonished every body."

In his letter returning this discharge, Finlarig April 6, 1803.
 says:—"I find by the dividend, that Campbell
 "must have died much involved; and from seeing
 "the bond being landed security, I see it hardly
 "possible to guard against a man that is in good
 "credit, when he is inclined to be a villain," &c.

In the month of November, 1803, Mr. Mac- Nov. 18, 1803.
 donald transmitted to Finlarig a discharge for an-
 other dividend inclosed in a letter, of which the
 following is an extract: "I am favoured with
 "yours of the 12th current, and was just prepar-

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“ing to write you with the inclosed papers for
“ your signing, when your letter came to hand.
“ This second dividend of Colonel Campbell’s
“ estate, (and God knows when the next will take
“ place,) will, small as it is, enable me, with 50l.
“ of interest I have to draw in January next for
“ you, to pay the 100l. you are to draw for, which
“ do when you please. I have lent this term
“ 400l. for you, made up of interest with the
“ former dividend from Colonel Campbell, as I
“ manage for you as I do for myself; and there-
“ fore don’t draw for more than this 100l. you
“ mention, till next Martinmas, if you can avoid
“ it, because I’ll have no money of yours till
“ then; but for all that, if you are in need, I’ll
“ honour your bills.”

Nov. 22, 1803. Finlarig returned the discharge, executed, in a letter to Mr. Macdonald, in which he says,—“ I
“ am favoured with yours, inclosing the instru-
“ ment and discharge, which I have executed, as
“ near as I can, according to your instructions.
“ The witnesses are both my servants, and lives
“ in my family at Finlarig, and signed this day the
“ witnesses and myself. I will draw no more than
“ the 100l. from you, I hope, for a year. I am
“ always sensible of your good offices towards me,
“ since I had the honour of your acquaintance,
“ and I am always sensible that you do every
“ thing for my interest,” &c.

The dividends received from Campbell’s estates, and paid over to Finlarig, amounted to 304l. 1s. 3d. He died in the year 1806, leaving an only child, the Respondent, Mrs. Lillie.

In the year 1807, Mr. Macdonald, the Appellant's father, having rendered a state of his accounts, and in the year 1811, a farther and final account, to the representatives of Finlarig, Mrs. Lillie, in a letter of July 20th, 1811, wrote to Mr. Macdonald in the following terms :—“ My uncle, July 20, 1811.

“ Mr. Grant, at Muirtown, was favoured with
 “ your letter of the 11th instant, inclosing an ac-
 “ count current between you and my curators,
 “ commencing the credit side in your favour on
 “ 20th March, 1807, and ending on the 11th July
 “ current; commencing the debit side against
 “ you 26th February, 1807, and ended on the
 “ said 11th July current; on which there arises a
 “ balance due by you to me and my late curators,
 “ of 51*l.* 15*s.* 9¼*d.* *This account has been perused*
 “ *by myself, Mr. Lillie, and Mr. Grant for himself,*
 “ *and acting as factor for my other curators, and is,*
 “ *as well as all other accounts rendered by you of*
 “ *your intromissions with my father's concerns,*
 “ *found to be perfectly accurate and satisfactory to*
 “ *all concerned; not only so, but the liberal and*
 “ *friendly manner in which you have conducted this*
 “ *business in general, by departing from claims so*
 “ *competent to yourself, merits, as I trust it will*
 “ *have, my most ample acknowledgements and grati-*
 “ *tude upon all future occasions. I have therefore,*
 “ *this day, drawn upon you, with the consent of my*
 “ *husband, for the above balance of 51*l.* 15*s.* 9¼*d.**
 “ *in favour of John Gordon, Esq. Forres, at three*
 “ *days' sight, which we have no doubt will be duly*
 “ *honoured by you, and will of course be in full of*
 “ *all you are resting and owing either on account*
 “ *of your intromissions with my father's estate*

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*"during his life-time, or since his death with mine,
as his only child and executor."*

After the death of Finlarig, and after all the correspondence and transactions before stated (see p. 17), the account current, which Macdonald had transmitted to Finlarig in 1788, being found among his papers; the entry in it respecting Captain M'Niel's bond suggested an inquiry why, instead of resorting to the insolvent estate of Colonel Campbell, and taking the small dividends which it afforded, Macdonald had not recovered the money from M'Niel, a person in affluent circumstances.

Upon this subject, a correspondence* took place between Macdonald and the friends of Mrs. Lillie, in consequence of which a demand was made on Captain M'Niel; but he founded on the want of intimation of the assignment, as entitling him to plead compensation (a set off) on the three bonds for borrowed money granted in 1789, which he as surety had been obliged to discharge, and Colonel Campbell's bond of indemnity; and he pleaded also compensation on another debt, alleged to have been due to him from Campbell, on a transaction previous to the date of the bond assigned.

As to the latter ground of set-off, it appeared that by a personal bond dated in Dec. 1776, Colonel Campbell of Barbreck, and Captain John M'Niel the younger of Ugadale, upon a recital that they had borrowed and received from Niel M'Niel, Esq. of Ugadale, the sum of 1100*l.* ster-

* The only letter in this correspondence which appears to be material, is mentioned by the Chancellor, in his observations, *post*, 382, and an extract from it is printed at the end of this case.

ling, became bound jointly and severally to repay the said sum to the said Niel M'Niel, of Ugadale, or failing him by decease, to Captain Hector M'Neil of the Marines, his second son, and his heirs, &c. Captain Hector M'Niel, the substitute in this bond, is the same person who became the debtor in that which was assigned as security to Finlarig. The right to the sum secured by this bond, devolved, as it was alleged in the pleadings, upon Captain H. M'Niel. But, notwithstanding this apparent claim, H. M'Niel had, in 1788, paid three years' interest upon his bond to Colonel Campbell; and in the process of ranking of Colonel Campbell's creditors, no claim upon this bond for 1100*l.* was made by or on behalf of Captain H. M'Niel.

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Under these circumstances, in the year 1813, the Respondents brought their action in the Court of Session against Macdonald for payment of the 1000*l.* and interest, so far as payment had not been recovered from the estate of Colonel Campbell; founding on his gross and culpable negligence in not having intimated the assignment of Captain M'Niel's bond; and in order (as it was said) to give Mr. Macdonald an opportunity of proving, if he could, that there had been intimation, the Respondents made Captain M'Niel a party to the action. Macdonald, one of the defenders in this action, died shortly after its commencement; whereupon the Appellant, his son, became a party as his representative.

By an interlocutor pronounced on the 25th of June, 1814, the Lord Ordinary, before whom

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the cause came, assoilzied Captain M'Niel, but repelled the defences pleaded for the Appellant, and decerned against him according to the conclusion of the libel.

The Appellant having given in a representation against this interlocutor, to which answers were made for the Respondents, the Lord Ordinary, on the 17th January, 1815, pronounced the following interlocutor : " The Lord Ordinary having
" considered this representation, with the answers
" thereto, and whole process of consent of the
" pursuer, restricts the principal sum decerned for
" to the sum libelled of 1000*l.* sterling, deducting
" therefrom the sum of 248*l.* 17*s.* 8*d.* sterling paid
" to account, on the 13th of April, 1803, and
" 55*l.* 4*s.* 0*d.* sterling paid to account on the 30th
" of November, 1803; and further ordains the
" pursuers on receiving payment of the sums de-
" cerned for to assign over to the defender their
" claim to be ranked on the estate of Barbreck,
" that he may operate his relief, but *quoad ultra*
" refuses the desire of the representation, and ad-
" heres to the interlocutor represented against."

A representation against this last interlocutor was refused by the Lord Ordinary without an answer.

The Appellant then presented his petition to the Court in the Second Division, reclaiming against the said interlocutor of the Lord Ordinary,

Dec. 15, 1815.
1st interlocu-
tor of the
Lords of Ses-
sion 2d Div.
appealed from.

to which answers being made for the Respondents, the following interlocutor was pronounced :
" The Lords having advised this petition with the
" answers, refuse the petition, and adhere to the

“ interlocutor complained of in so far as respects
 “ the principal sum, and two partial payments
 “ therein specified, but consent to find interest
 “ only due from the 15th day of May, 1791, and
 “ to that extent alter the interlocutor complained
 “ of and decern; find the defender liable in ex-
 “ pences; allow an account thereof to be given
 “ in, and remit to the auditor to tax the same and
 “ report.”

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To this interlocutor the Lords adhered, by re-
 fusing a second petition for the Appellant on
 answers made;

Dec. 13, 1816.
 2d interlocu-
 tor of the
 Lords of Ses-
 sion appealed
 from.

And finally, they awarded costs to the Re-
 spondents, to the amount of 140*l.* 19*s.* 2*d.*

From these several interlocutors of the Lord
 Ordinary, and Lords of Session, the Appellant
 appealed to the House of Lords.

For the Appellant—*the Solicitor General** and
Mr. J. A. Murray. For the Respondents—*Mr.*
C. Warren and *Mr. W. Adam*.

On the part of the Appellants, it was argued
 that the agency was gratuitous—that the neglect
 was not gross—that intimation ought to be pre-
 sumed—that it would have been useless if made—
 as M’Niel might have pleaded compensation
 upon the old bond—that the client’s claim was
 barred by acquiescence and prescription; and
 that of his representatives by discharge—and both
 by length of time.

Argument.
 May 21, 1819.

* Sir R. Gifford.

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The gratuitous agency was denied on the part of the Respondents, and argued to be immaterial; and it was insisted that the responsibility continued, notwithstanding time and apparent acquiescence; for the client was ignorant both of the fact and the law; and the agent, continuing to act for the client and his family, kept them uninformed, contrary to his duty. The fact was discovered by the representatives, after they had given the discharge. If M'Niel had any counterclaim, he would not have paid interest.

On behalf of the Appellant the following authorities were cited:—Ersk. 3. 7. 29. on the extinction of obligations by taciturnity; Ersk. 4. 4. 109. As to the vicennial prescription, which operates even in cases of murder, *Macgregor's case*, M'Laurin's Crim. Cases.* As to bar by presumption, *Wemyss v. Clark*, 28th June, 1749, Dict. of Decis. 11640; *Case of Fullarton*, 27th July, 1757. As to length of time, Kames, tit. *Grounds and Warrants*, p. 353; *Blackwood v. Purvis*, Dict. of Decis. 5167; *Provost of Stirling v. Jardine*, Dict. 5191; *Maxwell v. Maxwell*, Dict. 5174; *Maxwell's Creditors*, Dict. 5181; *Wilson v. Sellers*, Fac. Coll. 6th July, 1757, Dict. 5184. As to prescription, under stat. 1494, c. 57. and 1617, c. 13. Ersk. 3, 7. 19. As to implied discharge and renunciation, Kames, pp. 430—440. *Hogg v. Niven*,

* pp. 595. 773. Callum Macgregor, Aug. 9. 1773, was put upon his trial for a murder committed twenty-five years before the indictment. It did not appear that any sentence of fugitation had passed against the prisoner, and the Court unanimously sustained the defence of prescription.

Dict. 6533. As to settlement of accounts, *Graham v. Rothead*, Id. 6534.* 1819.

For the Respondents the following cases were cited, of mandatories and agents held liable for neglect :—*Garden v. Lindsay*, Dict. 3519; Case of *Susanna Rae*, Id. 13963; *Goldie v. Macdonald*, Id. 13965; *Lizars v. Dickie*, Id. 3532; *Masson Thorn*, Id. 3535 and 13967.

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The *Lord Chancellor*, in the course, and at the conclusion, of the argument, made the following observations :—when Campbell's insolvency became known, it did not appear that M'Donald the writer mentioned the assignation in the whole course of the correspondence—the form of the assignation was to M'Donald the lender (Finlarig), and to M'Donald the writer, which was said to be the common form—in the summons, the pursuers state that they did not discover the fact of the assignation until after the letter of discharge: there was no clear evidence that the bond was in the hands of Finlarig—Colonel Campbell's bond contained a recital of the assignation—and Finlarig ought to have had, not only Colonel Campbell's bond, but also the bond recited to be assigned—it did not appear why M'Donald the writer made no claim against M'Niel—if the intimation had been given, he was liable—if M'Niel had a prior demand upon Campbell, how

* And see generally in the Dict. of Decis. the titles Prescription, Presumption from Lapse of Time, Grounds and Warrants, and Implied Discharge.

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If a debtor by obligation, having a counter-claim of compensation against his creditor, knows of a transaction of loan, in which his creditor assigns the obligation as a collateral security to the lender—and suppresses his knowledge, leaving the parties to complete the transaction of loan and security—he cannot afterwards claim compensation so as to defeat the collateral security.

did it happen that M'Donald, being the law agent of both, took it as a security, knowing a fact which would make it ineffectual—if there was no prior debt, then there was nothing to prevent the claim against M'Niel. Suppose M'Niel had a prior claim, unknown to both the writer and the lender; if he suppressed that fact, knowing of the transaction of loan and security, he could not claim compensation. It is unaccountable that the security was not made complete by intimation. For when the writer recommended the security, he had received a letter from Campbell, which showed the hazard of lending the money on his personal responsibility.

But if the bond had been duly assigned, and duly intimated, would there have been any necessity to wait for the winding up of Campbell's affairs, before suing upon the bond of M'Niel?

In the oath of verity, in the process of ranking, M'Donald recites the assignment, "This deponent," &c. *Appendix to paper*, 6th April, pp. 18, and 19. After this he cannot say he considered the security as good for nothing.

The printed cases have not stated letters written in 1813, which are material. In one of those,* M'Donald the writer states the bond only to have been deposited. From this representation, it appears improbable that there could have been intimation of assignation. *Paper*, 12th June, 1815, p. 11.

* See extracts from this letter at the end of the case.

Lord Redesdale observed, that when M'Niel became a creditor, it was not likely he would leave a bond in the hands of his debtor.

The *Lord Chancellor* moved the Judgment.

The proceedings in this case were instituted in 1814, and as they refer to transactions commencing in 1788, the case deserves great attention. It is a claim made against an agent, for compensation on account of negligence in providing for the interest of his client. It is admitted that Mr. M'Donald was highly respectable in his profession. I should be unwilling to act on any principle adverse to the doctrines of presumption or prescription. If this is to be represented as a cause of action arising in 1788, and there was nothing to keep it alive, it would be too dangerous to inquire into it. But, unless I mistake the nature of the case, there certainly was negligence; and the ground of the complaint is not taken away by lapse of time, or the nature of the transactions which have since taken place.

The word negligence, I do not use in a sense reproachful to the memory of Mr. M'Donald the writer.

In 1788, M'Donald the father (Finlarig) employed M'Donald the writer to place out his money on good securities. Colonel Campbell was a man in suspicious circumstances, as we may understand from the advice against real securities, on account of the evidence which it would furnish upon record. The fact that he wanted 1000*l.* is a proof that he was not in easy circumstances. Colonel

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Campbell was obligee in a bond from M^cNiel, and M^cDonald the writer gets an assignment of this bond, as an additional security. There is no doubt that the bond was assigned: it must be inferred that M^cDonald the father knew that his money was lent on a bond. That might have been an objection in England, though not in Scotland.* The policy of the law requires that we should hold that Macdonald the writer knew that intimation was necessary, and that the security was imperfect without it. By a letter, written in January, 1792, from Macdonald the writer to Campbell, it appears that Macdonald the father intended to call up the money; or that Macdonald the writer, knowing the risk of Campbell's insolvency, desired it. In that letter, he says, "I had
" a letter lately from my namesake, who lent you
" 1000*l*. some years ago, upon your own bond
" simply, containing an assignation to a bond of
" Captain Hector's, for the like sum, and he men-
" tions his intention of sending me the bond, as
" he wants the money," &c.

There has been much argument as to the question in whose possession the bonds were; but it is not material. It is fully ascertained that, at a subsequent period, the bonds must have been in the possession of Macdonald the writer. At this time, Macdonald the writer was negotiating securities from Colonel Campbell; and then, not confiding in the circumstances of Campbell, occurs

* Because heritable bonds charge the land specifically, and, when perfected by seisin, operate as a direct conveyance by mortgage, in England.

the expression as to heritable securities. It is not easy to understand the expression, as to securities of record, in any but one way. The accounts sent in (the first, the second, and the third, being further parts of the same account,) may be said to have been in the possession of Macdonald the father, from 2d April, 1792, up to the year 1811. There is, in these accounts, an item thus: "*By three years' interest from bond and assignation.*" This is said to be an intimation to the father; but, from the complexion of the accounts, and the other transactions, it is just to say that Macdonald the writer was, in the amplest sense, the man of business of Macdonald the father, and bound to advise and act for him. Colonel Campbell died in 1792, in a state of embarrassment. Immediately following that event, there is a letter from Macdonald the writer, intimating that his affairs might be retrieved.

Macdonald the writer still continued to be the man of business for the father, and afterwards for the representatives. If the bond of M'Niel had been intimated, the insolvency of Campbell would not have prevented their putting it in suit. But no demand was made upon it; and in the correspondence it is remarkable, that in all the letters between Macdonald the father, and Macdonald the writer, no mention is made relative to the bond supposed to be assigned, or the intimation of it, or the reason why it was not made effectual, if completed. To meet this observation, it is said that if there be taciturnity, courts do not inquire; and, undoubtedly, though nothing is more im-

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portant than to hold professional men to accuracy, yet, on the other hand, they ought not to be made to account, twenty-five years after a transaction, if the circumstances of the particular case make it unreasonable ; but circumstances are to be considered. Whether the father knew the law of intimation, is doubtful ; but the writer must have known it, and ought to have acted upon it. This is the taciturnity, not of Macdonald the father, but of Macdonald the writer. The representatives, when they find the papers as to the bond and assignment, call upon Macdonald ; and, looking at the letters, it is difficult to read them, and suppose he had lost his memory. He could not have forgotten so far the transaction as to call that a deposit, which, in the accounts, he had called an assignment. This case, therefore, by its circumstances, is taken out of the principles of presumption and prescription, which ought to protect professional men. On these grounds, and a fair view of the case, as a juryman, it is my opinion that the bond was not intimated ; and, by reason of non-intimation, the debt was lost from the estate. Either the want of intimation caused the loss, or, if it was intimated, and the doctrine of set-off had applied, Colonel Campbell might have been called upon forthwith to pay, and, at that time, could have paid ; because he afterwards raises 3000*l.* on different bonds. That transaction could never have furnished a defence against a bond duly intimated.

Professional men must be strictly held to such accuracy as to give security to their employers.

Lapse of time, under circumstances, may be an excuse; but the former principle preponderates here: and as the safety of clients ought not to be discussed at the expense of their representatives, this case ought to be affirmed with 80% costs.

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Lord Redesdale. — Macdonald the writer recommended the security of his own client, Campbell, with collateral securities. It is clear that no intimation was given, because of the transaction in 1789, where M'Niel became security for Campbell to the amount of 3000*l*. If M'Niel had been debtor to Campbell in 1000*l*. that transaction would have taken place in a different form. When Campbell died, and his affairs were in a state of insolvency,* Macdonald does not give notice immediately; but in December following, stating the circumstances, and the necessity of going upon the estate of Campbell, he does not mention a word of the demand against M'Niel. If Macdonald had not been then conscious that no demand could be made, he would have spoken of the claim on him. His memory was then full; because it was but a few years after the transaction; and then he must have known whether he had given intimation. The letter of 1813 clearly proves that there was no intimation.* There was

* Referred to by the Lord Chancellor, ante, p. 332. It is a letter from M'Donald the writer to Mr. Lillie, dated March 26, 1813. It contains the following passages:

"I can now, however, tell you that Captain M'Niel was not bound as cautioner along with Colonel Charles Campbell; for, at that time, the Colonel was in great credit, and in pos-

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no necessity to wait for winding up the affairs of Campbell's estate. These transactions could arise from this circumstance only, that there had been no intimation. The negligence is clear. As to length of time, the letter of 1813 holds out hope as against M'Niel. There was no negligence in Finlarig, or his representatives. He was a person of ignorance, trusting to his legal adviser, and the representatives acted as *soon as* they had information.

Judgment affirmed.

" session of a large estate ; but the Colonel gave him a bond of
" the Captain's for 1000*l.* *by way of deposit, as additional*
" *security, with his own bond, for the 1000*l.* of Finlarig's*
" money lent him ; and upon the Colonel's death, it was found
" that he was so much involved in transactions with Captain
" M'Niel that it is difficult to say what may be recovered from
" Captain M'Neil, or how far he may be liable, until the
" process of ranking and division, among the Colonel's cre-
" ditors, is deliberately examined into, which must take time,
" as there is no access, at present, to that part of the process,
" which is most material to be looked into, it being borrowed
" up by one of the agents for creditors, who has either mislaid
" it, or lent it to some other of the agents, and requires time to
" be got at. At any rate, there are further dividends to be
" made, of which Mrs. Lillie draws her share ; which is all I
" can say on the subject at present."

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

CASE OF THE QUEENSBERRY LEASES.

POWER of an heir of tailzie in respect of leasing.

In what respects an heir of tailzie is absolute owner of the estate, and in what respects he is bound to administer for the benefit of his successors under the entail.

The word "dispone," in the prohibitory clause of a Scotch entail, has the same meaning and operation as the word "alienate."

Those words prohibit long leases, as alienations inconsistent with a due administration of the estate.

A lease for 57 years is a long lease within the meaning of the prohibition.

Words prohibiting alienation affect a lease by which the grantor of the lease, the heir of entail in possession, does not reserve to the succeeding heir of entail the same benefit as to himself, as, by reserving a given rent to the grantor during his life, or for the first years of the term, and a smaller rent after his decease, or for the remainder of the term.

Grassum (a fine taken upon granting a lease), is anticipated rent.

Therefore, a lease made upon a grassum paid to the grantor, is an alienation *pro tanto* of the rent.

A power in an entail to make leases "without diminution of the rental, at the least at the just avail for the time," means, at the fair value at the time of leasing, not the last rent, which may have been paid a century before.

"Rental," in that clause of the entail, is the same in construction as "rent."

The heir in possession taking a grassum effects a diminution of the rental or rent, and does not take the just avail for the time.

It is a diminution of the rent if grassum was taken upon a preceding lease; and such lease being surrendered before its expiration, a new lease is granted at the old rent.

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Leases granted upon such terms are void, as between the heirs of the entail.

Whether leases granted for 31 years, or so many years as the Court of Session or House of Lords shall deem to be within the power of the heir of entail, are void as uncertain, and not according to a due administration of an entailed estate. *Quære.*

Leases made by the heir of entail in possession, for nineteen years, with covenant to renew annually during his life, are not void, as being a transgression of the power to lease for the setter's life, or nineteen years.

Numerous leases granted by the heir of entail for his own benefit, and to the prejudice of the succeeding heir of entail, operate as a fraud upon the entail.

THE LORD CHANCELLOR*.

MY LORDS,

4 July 1819.

THIS is unquestionably the most weighty and important cause, which, in the course of my professional life, either at the bar or in a judicial situation, I have ever had occasion to consider: important in its

* These were appeals arising out of various actions of declaratur and reduction, in which the trustees of the late Duke of Queensberry, the present Duke of Buccleugh and Queensberry, the Earl of Wemyss and March, and certain lessees of the late Duke of Queensberry, were parties. The cases turned upon the construction of two entails; the one called the March and Neidpath, the other, the Queensberry entail: and the principal questions arising and discussed in the cause were,—1st. Whether, in the prohibitory clause of an entail, the word “dispone” was equivalent to the word alienate, and had the same effect to prevent alienation? 2d. Whether long leases, and of what endurance, were alienations? 3d. Whether taking grassum was a breach of the prohibition to alienate? 4th. What was the true construction of a power given to the heir of tailzie in possession to make leases “without diminution of the rental, at the least at the just avail for the time;” whether it meant the last preceding rent taken, or the fair value at the time of leasing; and

consequences as a question of great value to those who are directly interested in it; but in that

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whether taking a grassum was a breach of that condition annexed to the power of leasing? 5th. Whether leases for 31 years, or if the Court of Session or House of Lords should hold such leases to be void as too long, then for such period as those Courts should approve, were good leases, *i. e.* whether the Court would restrict the endurance, and define the risk for the parties? 6th. Whether leases for nineteen years, with obligations to renew for the same period annually during the life of the grantor, were prohibited, as being for the setter's lifetime *and* nineteen years? 7th. Whether leases at the same rent, substituted for and upon the surrender of former leases, which had been made with grassum, could be sustained? And finally, Whether leases of the several descriptions before stated, granted by the heir of entail in possession to the amount of many hundred, were to be considered as frauds upon the successors in the entail.

The appeal was before the House of Lords in the year 1817, and on the 10th of July was remitted, with special directions, for the reconsideration of the Court of Session. After judgment upon the remit, the cause now came for the final decision of the House of Lords.

The nature of the several actions in the Court below, the parties to them, the terms of the respective entails, the several matters in issue, the arguments urged before the original and appellate jurisdictions, so far as they are material to understand the question, appear in the following observations made in moving the judgment on this appeal. More exact information (if desired) upon these points, may be found in the printed cases; and a general outline of the pleadings, and the facts and questions, may also be found in the observations of the Lord Chancellor in moving the remit upon the former appeal.—MS. 9 July 1817. Dow's Rep. vol 5. p. 297.

No part of the arguments are given in this report, because the principal topics of argument are noticed in the Chancellor's speech in moving judgment, and from their extreme length, it would not be possible, within moderate bounds, to do justice to the great ability of the advocates who pleaded the cause at the bar of the House.

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point of view, it sinks, as it seems to me, into absolute insignificance, when it is considered, with reference to the effect, which the judgment in this cause, whatever it may happen to be, must have upon the interest of landed proprietors of Scotland.

In order to render the question intelligible, it becomes necessary to enter into a statement of the law of Scotland as referrible to the facts and circumstances of this case,—the law of Scotland, not as it is understood in interpretation, but as it is to be found in acts of Parliament; for the question between these parties arises upon what is the true intent and meaning of an act passed in Scotland in 1685, which is their act respecting tailzies. Tailzies existed long before that period, but the present case is to be considered upon the true construction of that act of Parliament, as attaching upon the tailzies of the March and Neidpath estates, and the Queensberry estate.

Before and since the passing of that act, it has been the subject of much controversy, what is the law of Scotland as to the interpretation of tailzies. They have been treated as matters *strictissimi juris*, as not to be construed by intention, but only on what you find embodied (to use their phrase) in expression; and those principles have certainly, before and since the act, been applied to tailzied instruments.

The several cases were argued at the bar of the House of Lords upon the original hearing by Mr. (now Vice Chancellor) Leach, Mr. Jeffrey, Sir S. Romilly, Mr. Cranstoun, and Mr. Moncrieff, on the 3d, 5th, 7th, 10th, 13th, 14th, 17th, and 18th of February 1817; and after the judgment of the Court of Session upon the remit, by the Lord Advocate (Machonochie), the Solicitor General (Gifford), Sir S. Romilly, Cranstoun, Moncrieff, and J. Murray, on the 13th, 15th, 17th, 20th, 22d, and 27th of April 1818.

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That act of Parliament is in these words :

“ Our Sovereign Lord, with advice and consent of his Estates of Parliament, statutes and declares, that it shall be lawful to his Majesty’s subjects to tailzie their lands and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolute clauses, whereby it shall not be lawful to the heirs of tailzie to * *sell, annailzie or dispone* the said lands, or any part thereof, or contract debt, or do any other deed whereby the samen may be apprysed, adjudged or evicted from the others substitute in the tailzie, or the succession frustrate or interrupted, declaring all such deeds to be in themselves null and void, and that the next heir of tailzie may immediately, upon contravention, pursue declarators thereof, and serve himself heir to him who died last infest in the fee, and did not contravene, without necessity anywise to represent the contravener. It is always declared, that such tailzies shall only be allowed in which the aforesaid irritant and resolute clauses are insert in the procuratories of resignation, charters, precepts and instruments of seisin, and the original tailzie once produced before the Lords of Session judicially, who are hereby ordained to interpose their authority thereto, and that record be made in a particular register-book, to be kept for that effect, wherein shall be recorded the names of the maker of the tailzie, and of the heirs of tailzie, and the general designations of the lordships and baronies, and the provisions and conditions contained in the tailzie, with the foresaid irritant and resolute clauses subjoined thereto, to remain in the said register *ad perpetuam rei memoriam* ; and for which record there shall be paid to the clerk of register and his deputes, the same dues as is paid for the registration of seisins ; and which provi-

* Here the Lord Chancellor noticed the arguments upon the construction of the words *sell, alienate and dispone*, which occur afterwards, p. 360.

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“ sions and irritant clauses shall be repeated in all the
“ subsequent conveyances of the said tailzied estate to
“ any of the heirs of tailzie ; and being so insert, his
“ Majesty, with advice and consent foresaid, declares the
“ samen to be real and effectual, not only against the con-
“ traveners and their heirs, but also against their credi-
“ tors, comprisers, adjudgers, and other singular succes-
“ sors whatsoever, whether by legal or conventional titles.
“ It is always hereby declared, that if the said provisions
“ and irritant clauses shall not be repeated in the rights
“ and conveyances, whereby any of the heirs of tailzie
“ shall brook or enjoy the tailzied estate, the said omis-
“ sion shall import a contravention of the irritant and
“ resolute clauses against the person and his heirs who
“ shall omit to insert the same, whereby the said estate
“ shall *ipso facto* fall, accresce, and be devolved to the
“ next heir of tailzie, but shall not militate against cre-
“ ditors, and other singular successors who shall happen
“ to have contracted *bonâ fide* with the person who stood
“ infest in the said estate, without the saids irritant and
“ resolute clauses in the body of his right.”

And then there is a saving of his Majesty's con-
fiscations or fines.

Without entering at present into other considera-
tions relative to this act, it appears that authorizing
certain entails, it requires, in order to make them
good, at least against claims of third persons, that
they should have prohibitory, irritant and resolute
clauses ; and it has always been held, that clauses of
each of these kinds are necessary to give the effect
to those tailzies which this act of Parliament intends
should be given.

In construction this also seems to have been set-
tled, that you cannot entail unless there is an express
prohibition ; you cannot entail by implication. That
appears to have been intentionally prevented by some
of the expressions used in the act of Parliament. If

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there be no prohibition to sell, annailzie and dis-
pone, a prohibition to make any deed by which
persons might be evicted has been held insufficient.
And so it has been decided in the case of other im-
plications, that the *prohibitions from which they*
appear to arise by necessary consequence would not
deprive the heirs of tailzie of the power over the
estate as to matters not expressly prohibited. Unless
there is a prohibition of each sort, the heir of tailzie
is free to take advantage of the omission. Where,
for instance, the prohibition is not to alter the suc-
cession; nothing in the world could more clearly
interrupt the succession than the sale of the estate;
and yet a prohibition to interrupt the succession would
not prevent a sale by the heir. I conceive also, that
if the clause *de non alienando* fail, the acts prohi-
bited not being stated again in the irritant clauses
as acts that are prohibited, they are not effectually
prohibited. If the clauses are not complete, the
frame of the tailzie would not be sufficient to protect
those who are to take under it; and indeed in some
decisions, this sort of construction has been carried
to a length, which I confess has surprised me very
much; but a Judge must take care that the surprise
which affects his mind, shall not affect the law as
settled by decisions. Nothing surprised me more
(to mention one among many) than the Dun-
treath case*, in which it was held by this House,
contrary to the opinion of the Court below, that
where there were prohibitions against the heirs of
tailzie, yet, as the first taker under the disposition
was known to the law of Scotland as the institute,

Duntreath
case; an ex-
traordinary
decision.

* Edmonstone v. Edmonstone, Nov. 24, 1769. D. P. 15 April,
1771.

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and not as the heir, he was not affected by the prohibitory or other clauses, notwithstanding the person who had framed the tailzie, the donor of the gift, had called that very individual, in many many places in his tailzie, an heir of tailzie. In considering the two deeds of entail upon which this question arises, attention must be paid to what may be represented as the difference between the *prima facie* and obvious meaning of those instruments, and what may be contended to be their legal construction.

Entail of
March and
Neidpath
estate, by deed
of 12 Oct.
1693.

The entail of the March or Neidpath estate was effected by a deed bearing date the 12th of October 1693, but not recorded till the year 1781. It appears from the leases, that the late Duke of Queensberry had possessed the estate from the year 1731 to the year 1781, before this entail was recorded, as the statute requires it should be, yet the late Duke raised a very considerable sum of money upon the estate soon after he succeeded to the Queensberry estate in 1772.

This deed of entail was made upon the marriage of Lord William Douglas with Lady Jane Hay, stating that in contemplation of the marriage, “ William
“ Duke of Queensberry, in virtue of the power and
“ faculty reserved to him by the infeftments of the
“ lordship of Neidpath, be thir presents binds and
“ obliges him, and his heirs and successors what-
“ soever, upon his own proper charges and expenses,
“ to duly and lawfully infeft and sease the said
“ Lord William Douglas, and his heirs male and
“ of tailzie after mentioned, in the lordship of Neid-
“ path, containing and comprehending the several
“ lands, baronies (and so forth), particularly and
“ generally after mentioned, to be holden from his

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“ Grace and his foresaids, of his immediate superiors thereof, sicklike and as freely as he holds the same himself, and that he is to do this *by resignation* in favour of the said William Lord Douglas his son, and the heirs-male to be procreated betwixt him and “ the said Lady Jane Hay his promised spouse ; which failing, to the heirs male of his body to be procreated in any other lawful marriage ;”—(I call your attention to the words, that he is to do it by resignation, without stopping to state my reason at present ;)—“ which failing, to the other heirs of tailzie after specified, according to the order underwritten, under the express provisions, reservations, limitations and conditions hereafter rehearsed, and no otherwise ; and for making the aforesaid resignation, the said William Duke of Queensberry and Lord William Douglas make (certain persons) their very lawful and irrevocable procurators for them, and in their names to resign, surrender, overgive and deliver, as they be their presents resign, surrender, overgive and deliver, all and hail the lordship of Neidpath.”

The tailzie then, at great length, mentions the particulars which form that lordship, among which are, “ All and hail the tenandry of the Holy Cross Kirk of Peebles ; and moreover all and sundry the lands and barony of Newlands, the lands and barony of Linton respectively, with their pertinents called Kirkwird and Lochwird ; and further, *the lands, baronies and others under written.*” The particulars comprehended under those words, lordships, baronies and others underwritten, are distinguished in this tailzie as what are called warrandice lands.

Warrandice
lands.

Then the entail goes on to state who are the heirs

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Power of
revocation.

of entail, and the substitutes, and then there is a reservation in the following words: " Reserving
" always to the said William Duke of Queensberry
" his liferent of the haill lands, baronies, lordship
" and others above rehearst, except as to those parts
" thereof particularly after specified, which are hereby
" allocate to the said Lord William Douglas for his
" present maintenance, and to the said Lady Jane
" Hay for her liferent, as the same shall happen to
" fall out, and during the existence thereof *respec-*
" *tive*:" then follows this clause, " notwithstanding
" the right of fee of the said haill lordship and
" warrandice lands a-specified be hereby conveyed
" and established in favours of the said William
" Lord Douglas and his foresaids, and of the other
" heirs of tailzie above mentioned, yet it shall be
" always lawful to, and entirely in the power and
" liberty of the said William Duke of Queensberry,
" by himself alone, at any time during his life,
" without consent of the said Lord William Douglas
" his son, and his heirs above mentioned, or of any
" other of the heirs of tailzie a-specified, hereby
" appointed to succeed in the lands, baronies, lord-
" ship and others a-written, to sell, alienate and
" *dispone* the lands of Newlands and Linton, and
" also the tenantry of Holy Cross Kirk of Peebles,
" comprehending all and sundry the particular lands,
" annualrents, and so forth, that is, the lands of
" Newlands, Linton, and Holy Cross Kirk of
" Peebles, and all and haill the foresaid tenandry
" of the said Holy Cross Kirk of Peebles, compre-
" hending the lands, &c. in favour of any other
" person or persons he shall think fit, and likewise
" to burden the said lands and others immediately

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LEASES.

“ above rehearst,” (that is, those three parcels of
 land,) “ with such debts or sums of money as his
 “ Grace shall appoint, either by bonds of provision
 “ or any other rights or obligations, albeit the same
 “ be only personal rights containing no clause of
 “ infestment; and likewise reserving power and
 “ liberty to the said William Duke of Queensberry
 “ during his lifetime, to set tacks of the hail lands,
 “ baronies and others immediately above rehearst,
 “ for payment of such yearly duties, and for such
 “ space and endurance as he shall think just, and to
 “ set tacks of the remanent lands and others above
 “ rehearst, except these which are allocated hereby
 “ to the said Lord William for his present main-
 “ tenance, and to the said Lady Jane for her liferent
 “ from and during the time that her said liferent
 “ shall exist, and that for such duties as he shall
 “ think fit, and to continue during all the days of
 “ his lifetime;”—(I read these words, because in the
prima facie, or if I may so state it, the English
 meaning, we should infer from this sort of positive
 provision, that the general words of disposition
 which the author of this entail had made as against
 himself, would tie up his hands from doing those
 acts, unless he had reserved to himself permission to
 do those acts which I mention, because it will be
 necessary to go into a great deal of discussion on
 points of this nature;)—“ and likewise to burden the
 “ said lands, and set tacks thereof in manner above
 “ written; all which rights to be granted by the
 “ said William Duke of Queensberry, in the re-
 “ spective cases above mentioned, are hereby declared
 “ to be good, valid, legal and effectual, and with
 “ the burden whereof the lands and estate a-men-

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tioned, in the cases above rehearst, is *hereby disponed* to the said Lord William Douglas"—(I lay a stress on the words "disponed," and "disponed to," and small variations of that kind, not from a sense of any intrinsic difference in the phrases "dispone," "dispone to," "dispone of," &c. but on account of the observations which I find in the printed cases,)—"to the said Lord William Douglas, "and his heirs-male foresaids in fee, and to the "other heirs of tailzie a-written, and that not only "against the said Lord William Douglas, and the "heirs of tailzie *respectivè* above specified, but also "against all singular successors, whether legal or "conventional, who shall have right to the lands, "baronies and others above *disponed* in all time "coming."

Then the heirs of tailzie are bound to confirm the deeds of William Duke of Queensberry, with respect to these excepted lands of Lintoun and Newlands; and then follows this clause, which appears to me not to be altogether immaterial with a view to observations which I shall have to make by and by; "and in like manner it is hereby expressly provided and declared, and to be provided "and contained in the resignations, charters and "infestments, and all the subsequent rights to "follow thereupon, that all and sundry the foresaids lands and baronies of Newlands and Lintoun, and tenandries of the Holy Cross Kirk of "Peebles, comprehending as said is, with the "teinds, patronages, offices, jurisdictions and others "particularly and generally above mentioned, pertaining thereto and comprehendit therein, shall "be redeemable, and under reversion by the said

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“ William Duke of Queensberry himself, at any
 “ time of his life, from the said Lord William
 “ Douglas and his heirs-male, and the other heirs of
 “ tailzie above mentioned, by payment making to
 “ them, or consignation to their behoof, of ane twenty-
 “ merk piece of gold, or 15*l.* Scots, as the value
 “ thereof, and that upon any day the said Duke
 “ should think fit during his said lifetime, upon the
 “ premonition of six days of before to be made by
 “ him to the said Lord William Douglas and his
 “ foresaids, at the mercat-cross of Peebles, in pre-
 “ of ane notar, and two witnesses,” and so on ;
 “ which provision and condition of reversion above
 “ written, and for the using of the which order of
 “ redemption, the extract hereof, or of the charter,
 “ or instruments of resignation or seisin to follow
 “ hereupon, is hereby declared to be as valid, effec-
 “ tual and sufficient, to all intents and purposes
 “ whatsoever, as if ane particular letter of rever-
 “ sion were made, subscribed and delivered, be the
 “ said Lord William Douglas and his foresaids, to
 “ the said William Duke of Queensberry, apart for
 “ that effect, with all solemnities requisite, where-
 “ anent for him and his foresaids he has dispensed,
 “ and hereby dispenses for ever : declaring always,
 “ likeas it is hereby expressly provided and declared,
 “ that in case the said William Duke of Queens-
 “ berry shall not, during his lifetime, exerce the
 “ foresaid faculty, by using ane order of re-
 “ demption, otherwise *disposing of* the lands and
 “ others contained in the foresaid provision of re-
 “ version ; that in that case, the said haill lands and
 “ lordship shall entirely pertain and belong to the
 “ said Lord William and the heirs of tailzie a-men-

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QUEENSBERRY
LEASES.Prohibitory
clause.

“tioned, upon the provisions, and with the burden of
“the clauses irritant and resolute under written.”

Then follow the prohibitory, irritant and resolute clauses upon which so much of difficulty has arisen in the present case; (those clauses are not the same in the entail of March and Neidpath, as they are in the entail of Queensberry.) “It shall
“noways be leisome and lawful to the said Lord
“William Douglas and the heirs male of his body,
“nor to the other heirs of tailzie respectively above-
“mentioned, nor any of them, to sell, *alienate*,
“wadset or *dispone* any of the lands, &c. above
“rehearsed, as well those to be resigned in favours
“of the said Lord William, in fee, as these reserved
“to be disposed by the said Duke of Queensberry,
“in manner foresaid:”—(observe here, that speaking
before of the lands which were to be disposed by
the Duke of Queensberry, in the manner stated in
former clause, he is to have the power of *dispon-*
ing; the word “dispone” being the self-same word
as the word in the prohibitory clause, and men-
tioned in the statute as one of the words to be used
in the prohibitory clause. The word “dispone,”
in the sense in which it is here used *primâ facie*,
at least means the same as to “dispose of;” for
the power of disposing, before rehearsed, is a power
to dispose of:—“or any part thereof; nor to
“grant infeftments of liferents, nor annualrents,
“forth of the same; nor to contract debts, nor do
“any other fact or deed whatsoever, whereby the
“said lands and estate, or any part thereof, may be
“adjudged, apprized or otherwise evicted from them,
“or any of them; nor by any other manner of way
“whatsoever, to alter or infringe the order and course

“ of succession.” So that this prohibitory clause certainly contained every thing that is required.

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LEASES.

Permissive
clause.

Then follow the irritant and resolute clauses, and upon them no objection has been made which has given rise to any argument ; but then there follows this permissive clause : “ It is hereby provided and declared, that notwithstanding of the irritant and resolute clauses above mentioned, it shall be lawful and competent to the heirs of taillie a-specified, and their foresaids, after the decease of the said William Duke of Queensberry, to set tacks of the said lands and estate during their own lifetimes, or the lifetimes of the receivers thereof, the same being always *set without evident diminution of the rental.*” Upon this clause, it is said on the one side, that it is a permissive clause ; but that according to the construction of Scotch tailzies, the author permitting these tacks, has not prohibited other tacks to be made, unless in addition to what he permits, he states what he prohibits, and therefore they say that this clause cannot prevent the heirs of tailzie from making leases other than those which under this clause they are permitted to make, for they say there is nothing in this tailzie prohibiting their making leases other than they are here permitted to make. On the other hand it is argued, that the obvious meaning of this (I refer to the *prima facie*, or the English meaning), is, that giving this permission is a ground for saying that all other leases except those which you are here permitted to make, must be understood some how or other to be prohibited to be made, and that the general words which occur in the prohibitory clause, namely, “ that he shall neither sell, alienate, wadset or dispo-
ne,”

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LEASES.

must in all, or some of them, contain a prohibition against leasing, and that it was necessary, in order to make such leases as here permitted, to take them out of the prohibition which is included in these terms, some or one of them, by inserting in the tailzie this permissive clause. In answer to that it has been said, "to sell," means to make sale; "alienate" does not apply to leases, which are personal rights of possession for a time, and although they are made *quasi* real by the act 1449, it is not in that sense which means an alienation; and so again they said with respect to "wadset" and "dispone." In the Queensberry entail, we are delivered in some measure from the difficulty which arises from those opposite arguments which I have been just hinting at, by what has already been done in the Wakefield case; in which a lease was made for ninety-seven years of a part of this estate, and it was insisted, that that was a good lease under the instrument which I have now been stating. But it was found in that case by the House of Lords, and I believe indeed by the Court below, that making a ninety-nine years lease was prohibited by the word alienate; and though the word alienate has one peculiar strict sense, namely, the local transfer of dominion of property, it was insisted, it might be construed, by looking at the language of various acts of Parliament and of various instruments; and that whatever might become of a lease of ordinary endurance, that is such a lease as was necessary for the administration of the estate, yet that a tack of ninety-nine years was included under the word alienate.

The deed then goes on to state, "that liferent provisions shall be in full contentation and satisfaction to the wives of the heirs of tailzie in possession of

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QUEENSBERRY
LEASES.Powers to
grant provi-
sions for
wives and
children.

“all right of terce.” Then it proceeds to impose the obligation on the heirs of tailzie to place no debt upon the estate ; and then follows the clause empowering them to lease, with the peculiar expression which occurs also in the Queensberry entail,—“without evident diminution of the rental ; and likewise, that it shall be lawful and competent to the said heirs of taillie to grant suitable and competent liferent provisions in favour of their wives, not exceeding the sum of five thousand merks of yearly free rent of the said estate, and to grant provisions in favour of their children, not exceeding two years free rent of the same.” What is to be considered an evident diminution of the rental in the case of the Queensberry entail, has been a great subject of controversy. On the one side, “without evident diminution of the rental” has been represented to mean, that you shall increase the rental if you can, by taking what is the just avail at the time ; on the other hand, it is said, it means this, you shall let without diminution of the rental ; but as circumstances may arise, in which you cannot get the former rent, you shall then get the just avail at the time.

There is then a clause which occurs in many English entails, and which generally occurs in the entails of Scotland, “that in case the said estate shall, be virtue of this present taillie, descend and fall to ane heir female, the said eldest heir female shall succeed thereto in haill, without division, and so forth *successivè*, and that they shall be holden to marry ane nobleman, or gentleman of quality of the sirname of Douglas : *at the least*, who, and the heirs above mentioned, shall be holden and

Provision in
case of descent
to heir female,
to marry, &c.
and take name
and arms, &c.

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LEASES.

Power of
revocation.

Clause of re-
nunciation of
the right of
redemption,
reversion, &c.
in the Duke of
Queensberry.

“ obliged, as in like manner the hail heirs of taillie
“ and provision above specified shall be holden and
“ obliged, to assume, take on and use the said sir-
“ name, and carry the arms of the family of Queens-
“ berry, with the proper distinction ; and that, in
“ case they shall either not assume the said surname
“ or arms, or make any addition thereto, or at any
“ time desist to use the same, the person so contra-
“ vening shall *ipso facto* amit and lose their right,
“ and shall incur all the clauses irritant and reso-
“ lutive above mentioned.” Then, “ there is re-
“ served to the said William Duke of Queensberry
“ and Lord William Douglas, full power and liberty,
“ during their joint lifetimes allenary, to alter and
“ innovate the taillie, both as to the substitute heirs,
“ after the heirs male of Lord William’s body, and
“ other conditions and clauses above mentioned, as
“ they both shall think fit, but with this express
“ declaration, that if no alteration be made be them
“ during their joint lives, this reservation shall im-
“ port no power to Lord William to alter the same
“ after the Duke of Queensberry’s decease.”

Then follows this : “ And in regard that the right
“ of the lands and lordship of Neidpath, hereby ap-
“ pointed to be resigned in favours of the said Lord
“ William Douglas, and his foresaids, (besides the
“ saids lands and baronies of Newlands and Lintoun,
“ and tenandry of the Holy Cross Kirk of Peebles,
“ which the said Lord Duke has reserved power to
“ redeem, burden or *dispose upon*, in manner above
“ written,) were, by the former infestments of 1687,
“ redeemable by payment of a twenty-merk piece
“ of gold, conform to the provision of reversion

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“ therein specified ; and the Duke of Queensberry
 “ had otherways power to *dispose thereupon*, or
 “ burden the same, or set tacks thereof, as he
 “ thought fit ; yet, being resolved now, that the
 “ same shall be free to the said Lord William
 “ Douglas his son, and his foresaid, from all debts
 “ and burdens ; therefore the said William Duke of
 “ Queensberry has, in contemplation of the mar-
 “ riage, consented to renounce, and by thir presents
 “ renounces, quit claims, and *simpliciter* discharges
 “ and overgives, the reservations and clauses con-
 “ tained in the said former infestment, in so far as
 “ concerns the haill lands, baronies and others of
 “ the lordship of Neidpath, except the said baronies
 “ of Newlands and Lintoun, and tenandry of the
 “ Holy Cross Kirk of Peebles, comprehending as
 “ said is, and that in favours of the said Lord Wil-
 “ liam Douglas, and the heirs male to be procreate
 “ betwixt him and the said Lady Jane Hay ; which
 “ failing, to the said Lord William his heirs male
 “ to be procreate be him in any other lawful mar-
 “ riage.” He also renounces the clauses, reser-
 vations and reversion contained in the foresaid in-
 festments, namely, that clause whereby the Duke of
 Queensberry had power to sell and wadset, or grant
 infestments of annualrent, and all other rights irre-
 deemable or under reversion, and to burden the lands
 with debts ; as also that clause whereby his Grace
 had power to set tacks ; and also that clause whereby
 is reserved to the said Lord Duke of Queensberry
 power to hold courts, and to use all jurisdictions,
 and to *dispose upon* the fines ; and likewise “ he re-
 “ nounces and discharges in favour of Lord William

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QUEENSBERRY
LEASES.

Disposition for
maintenance
of Lord W.
Douglas and
Lady Jane
Hay.

Warranty
against sti-
pends, cess,
and other pub-
lic burdens.

“ and the heirs of his body, in so far only as may be
“ extended to the lands particularly a-written, here-
“ by appointed to be resigned in favours of Lord
“ William, and which are not excepted nor reserved
“ to be *disposed upon* by the Lord Duke of Queens-
“ berry, the reversion or provision of redemption
“ contained in the foresaid infeftment or charter of
“ 1687, and all right of redemption competent to
“ him be virtue thereof; which renunciation and
“ discharge of reversion William Duke of Queens-
“ berry binds and obliges himself to warrant to Lord
“ William Douglas and his foresaids, at all hands,
“ and against all deadly.—And that the said Lord
“ William Douglas may have a present maintenance
“ for himself and the said Lady Jane Hay, his pro-
“ mised spouse, and their family, during their father’s
“ lifetime; therefore the said William Duke of
“ Queensberry gives, grants and *dispones* to the said
“ Lord William Douglas and his foresaids, the castle,
“ tower,” and so on, “ and that for the term payable
“ at Martinmas 1693, for the half-year preceding,
“ and in all time thereafter;” and then it gives him
power of raising actions, and warrants him against
all stipends payable to the ministers of the parish,
and from payment of all cess and other public bur-
dens. (I call your attention to the words, “ cess,
“ stipends and public burdens,” because you will
find there is a great contest between the parties with
respect to cess, stipends and public burdens, which,
if chargeable on the rental, operate as a diminution
of the rental.)

Then there is an obligation to infeft the Lady
Hay during her lifetime, which is not material to

be stated ; and a clause for provision for daughters, and another clause as to minister's stipends, which will deserve some consideration ; but there then follows another clause, which it appears to me right to notice : “ And further, that the said William Duke of Queensberry gives, grants, assigns and *dispones* to Lord William Douglas, *the rents* which might be due from the lands at the time of the death of the Duke of Queensberry, but which had not been received by him.” One of the words used in making this grant of the rents, and not of the lands out of which they arose, is the word “ *dispones* ;” and describing the rents he had himself not collected, he says, he grants and *dispones* such rents, viz. “ such as he should not otherways assign or dispone thereupon,” he gives them to Lord William, to be collected after his death.

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QUEENSBERRY
LEASES.

“ Dispone ”
applied to
rents.

Such is the charter upon which the questions arise with respect to the entail of Neidpath or March.

The entail of Queensberry was made upon the 26th of December 1705, and registered in the Register of Tailzies on the 21st of February 1724, and in the books of Session on the 17th of June 1724. That tailzie is introduced by these words : “ Be it known to all men by these presents, Us, James Duke of Queensberry, &c. heritable proprietor of the lands, lordships, baronies, heritable offices and others after specified, with the pertinents : Forasmuch as we having considered the state and condition of James Earl of Drumlanrig, our eldest lawful son, are fully convinced of his weakness of mind, and unfitness to manage our estate, or represent us in our dignities and in our said estate,

Queensberry
entail, 26th
Dec. 1705

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LEASES.

Word "sell"
importing a
gratuitous do-
nation.

Words "an-
nailzie" and
"dispone"
coupled in
sense.

"and being well resolved to leave no place for any question concerning the said James Earl of Drumlanrig, his condition and capacity, after our decease, for preventing all process or arbitrament on that subject, or on the succession to our honours and estate, and also for preventing the snares that may be laid for the said James Earl of Drumlanrig, to the visible prejudice of our estate and family: Therefore, and for the other weighty causes and good considerations us moving, We have thought fit (with and under the reservations, conditions, provisions, limitations, restrictions, clauses, prohibitory, irritant and resolute underwritten, annually, and no otherways) to be bound and obliged to *sell*,"—(here the word sell is certainly used not in the common sense of the word, because this is a gratuitous donation,)—"annailzie and dispone,"—(observe that the word annailzie is in this sentence coupled with dispone)—"heritably and irredeemably,"—(that is one way of disposing)—"to and in favours of ourself in liferent during all the days of our lifetime, and to Lord Charles Douglas, our second lawful son, and the heirs male lawfully to be procreated of his body, in fee;"—(then it goes through the illustrious family by name, limiting estates to a great many persons, and the heirs of their bodies;)"—"reserving always to us our liferent-right of the said earldom, whole lands, baronies and others above written; as also reserving the liferent-right of such of the said lands and baronies as Mary Duchess of Queensberry is provided to,"—(viz. the said lands and barony of Sanquhar, comprehending the lands and others contained in her

rights and infeftments thereof,)—"as also it is hereby specially provided and declared, that the said Lord Charles Douglas and his heirs male, and the other heirs of tailzie above specified, shall be bound to make payment of all the debts that shall happen to be due by us, and perform all the deeds prestat-able by us the time of our decease;" and then it is further stated, "that notwithstanding the right of fee of the said whole earldom, lands, baronies and others above specified, be devolved and secured by this personal disposition and tailzie in favours of the said Charles Lord Douglas and his foresaids, and the other heirs of tailzie above mentioned; yet it shall be lawful for us to contract debts which shall affect the said Lord Charles Douglas and the heirs of tailzie, and the foresaid tailzied estate, in the same manner as if they were consenting with us in the several bonds, contracts, obligations, *dispositions* or other writs whatsoever, to be granted by us, or as if they were served heirs to us in our lands and estate; as also to sell, annailzie and *dispose*,"—(this is in the reserving clause; and observe how the word annailzie again occurs)—"as also to *sell, annailzie and dispose* the said lands and others above and after mentioned, in whole or in part, redeemably or irredeemably, for whatsoever cause, or in whatsoever manner of way; and to revoke, alter or innovate this present disposition and tailzie, and order of succession, in whole or in part, and generally to do all other things;" and so on.

Then follows the prohibitory clause, "that it shall not be lawful to the said Lord Charles Douglas, and

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LEASES.

Prohibitory
clause omit-
ting word
"alienate,"

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QUEENSBERRY
LEASES.

but containing
the word
"dispone."

"the heirs male of his body, nor to the other heirs of
"tailzie above mentioned, or any of them, to sell,
"wadset or *dispone*" (*omitting the word "alienate"*)
"any of the foresaid earldom, lands, baronies, offices,
"jurisdictions, patronages and others foresaid, nor
"any part of the same, nor to grant infestments of
"liferent or annual rent out of the same, nor to
"contract debts, nor do any other fact or deed
"whereby the same, or any part thereof, may be
"adjudged, apprised or anyways evicted from them,
"or any of them."

Judgment of
Court of Ses-
sion, that the
word "dis-
pone" has not
the same pro-
hibitory virtue
as the word
"alienate."

I pause here to observe, that even some of the
judicial opinions, the soundness of which you have
now the difficult duty of examining, turn upon
the circumstance, that the word "alienate" is
omitted in this prohibitory clause; and although in
the Wakefield case, by force of that generic term, a
lease of ninety-seven years was prohibited, it is held
that the word "dispone" will not have the same
effect. Some of the learned Judges were of opinion,
that they would have the same effect; but they
differed very much upon that point. I therefore call
your attention to the circumstance, that the word
"alienate" is not in the prohibitory clause in the
Queensberry entail.

Then follow these words, "except in so far as
"they are empowered, in manner after mentioned,
"nor to violate or alter the order of succession fore-
"said, any manner of way whatsoever;" that is,
they are not to "wadset, sell or dispone, nor to
"contract debts, nor do any other fact or deed,
"except so far as they are empowered in manner
"after mentioned, nor to violate or alter the order

“ of succession in any manner whatsoever.” Upon these words again arises much argument about permission and about exception. In an English instrument, we should say that a power to make leases being found in the clause of exception, was a ground for arguing, that unless it had been included in the clause of exception, it would be taken to be included by implication in the general words of the prohibition or restriction ; but they say, that is a principle not applicable to the law of Scotland. The prohibitory clause farther provides, “ that the heirs and “ descendants of their bodies, so succeeding, shall “ be obliged in all time coming, upon their suc- “ cession, to assume, and use, and bear the sirname “ of Douglas, and the title, designation and arms “ of the family of Queensberry, as their own proper “ sirname, title, designation and arms.” Then follows another clause, which is material ; “ and the “ said heirs female shall also be obliged to marry a “ nobleman or gentleman of the name of Douglas, “ *at least*, who shall assume, use and bear the said “ name and arms of the said family of Queensberry ; “ and if married, the said heirs female and the heirs “ of their bodies succeeding in manner foresaid, “ shall assume, use and bear the said name and “ arms of the said family of Queensberry ;” and they are to take the sirname of Douglas, with the arms, &c. of the family.

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LEASES.

Exception and permission, in an English instrument, implies a previous prohibition of what is not excepted and permitted.

Then follows this : “ and that the said Lord Charles Douglas, nor the other heirs of tailzie above specified, shall not set tacks nor rentals of the said lands for any longer space than the setter’s lifetime, or for nineteen years.”—(One great point

Prohibition to set tacks for more than life or nineteen years.

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CASE OF THE
QUEENSBERRY
LEASES.

Arguments on
construction
of the words
"diminution
of rental."

of dispute between the parties here is, whether certain leases, the particulars of which I shall mention hereafter, are leases for longer than the setter's life or nineteen years, and if they are, whether they are prohibited under the word "dispone," and the other words here used;)—"and that without diminution of the rental, at the least, at the just avail for the time." In the course of this cause, much discussion and most able reasons for the opinions on both sides have been stated, with respect to what these words, "without diminution of rental," mean. Those who take one side say, that it means no more than this, that if the land was let at the time of granting the new lease, for 3*l.* and it is let again for 3*l.* that is no diminution of the rental; others say, that if you let it for 3*l.* when you might let it for 300*l.* there is a diminution of the rental within the meaning of these Scotch entails; that if instead of letting it for more than 3*l.* you take a sum of money equal to the difference of value between 3*l.* and 300*l.* true it is, in one sense, you do not let it with diminution of rental, because the rent is still 3*l.*; yet that the operation of the law of Scotland upon the fact of your commuting the difference in rental between 3*l.* and 300*l.* for a sum of money put into your own pocket, is such, that though you have reserved to the persons to take after you a rent of 3*l.* it is demonstrable, that by the operation of such a law, 3*l.* is a diminished rental. How justly either of those propositions are stated, it is not for me to enter into now, when I am merely stating the facts of the case.

Then follow the words, "nor doe no other fact

“ or deed, civil or criminal, directly or indirectly, 1819.
 “ by treason or otherwise, in any sort, whereby CASE OF THE
 “ the said tailzied lands and estate, or any part QUEENSBERRY
 “ thereof, may be affected,”—(it is further contend- LEASES.
 ed, that what has been done by the late Duke of
 Queensberry was prohibited by these words,)—“ ap-
 “ prised; adjudged, forefaulted, or any manner of
 “ way evicted from the said heirs of tailzie, or this
 “ present tailzie, in order of succession, thereby
 “ prejudged, hurt or changed.”

Then follow these words, (which are important words for our consideration, if the law of Scotland operates upon the rent of 3*l.* in such manner as it has been argued :) “ neither shall the said Lord
 “ Charles Douglas, nor any of the said heirs of
 “ tailzie, suffer the duties of ward, marriage, and
 “ relief, either simple or taxed, nor the feu, blanch Clause for
 “ and teind duties, nor any other public burdens or payment of
 “ duties whatsoever, payable forth of the said tail- casualties of
 “ zied lands and estate, to run on unsatisfied, so as superiority
 “ therefor the lands and others foresaids may be and public
 “ evicted, apprised or adjudged from them, for any burdens.
 “ of the said casualties of superiority, and public
 “ burdens*.”

Then, after making the irritant and resolute clauses, and also directing that the heirs and parties succeeding should denude on existence of a nearer

* Here the Lord Chancellor entered into a discussion as to the effect of taking grassum upon the rent, the operation of law upon the transaction, and the consequence of the principle established in the Scotch courts by their final decision as to teind-duties, and the mode in which grassum is to be taken into calculation in the estimate of rent for the payment of those duties. The discussion is omitted here, because it is afterwards resumed to the same effect. See *post*.

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QUEENSBERRY
LEASES.

Power to pro-
vide for
spouses to the
amount of
2,300*l.*

heir, there follow provisions to spouses of male or female heirs, and provisions for daughters and younger children, and reserving the question, how far we are at liberty to look into such circumstances with regard to such entail; and not forgetting the principles of interpretation, as applied to entails, it has always struck me, that those clauses would be very material clauses to be considered: “ And notwithstanding
“ of the premisses, it is hereby provided and de-
“ clared, and shall be provided and declared by the
“ infestment to follow hereupon, and whole subse-
“ quent conveyances of the said tailzied land and
“ estate, that it shall be lawful to, and in the power
“ of the said Lord Charles Douglas, and of the
“ other heirs of tailzie above specified, whether male
“ or female, to provide and infest their lawful
“ spouses in competent liferent provisions, of a part
“ of the said lands and estates, not exceeding the
“ sum of 1,000*l.* sterling of yearly rent; and if there
“ shall happen to be two liferent provisions upon
“ the said estate, then and in that case the second
“ liferent provision, during the existence of the
“ first, shall not exceed 800*l.* sterling;”—(so that if
there were two, there might be provisions for spouses,
to the amount of 1,800*l.* a year, affecting the estate
at the same time;)—“ and if there shall happen to
“ be a third liferent provision upon the said estate,
“ then the same shall not exceed 500*l.* sterling,
“ during the existence of the other two liferent pro-
“ visions;” (so that there might be 2,300*l.* required
for these jointures.)

Then there is this clause: “ And also it is hereby
“ further provided and declared, and shall be de-
“ clared by the infestments to follow hereupon, and

“ all the subsequent conveyances of the said estate,
 “ that it shall be lawful to, and in the power of
 “ the said Lord Charles Douglas, or any of the
 “ said heirs of tailzie, to burden the said estate
 “ with any sum not exceeding the sum of four-
 “ score thousand pounds Scots, for providing of Powers to
 “ their daughters or younger children.” So that charge
 there might be three-and-twenty hundred pounds 80,000 l. Scots,
 a year charged upon and issuing out of the rent of for portions of
 this estate by way of jointure, and likewise this sum younger chil-
 of money for children, amounting to between six dren.
 and seven thousand pounds. These are consider-
 able burdens upon an estate, if it can be dealt with
 in the manner in which it is contended it can be by
 such tacks as have been made ; but still we must
 take into our consideration, that whatever may be
 the effect reasoning of that kind, the question at
 last results to this, what according to the general
 rule of interpretation as fixed by decision on Scots
 tailzies, you are at liberty to reason from such cir-
 cumstances as those to which I have been alluding.

During some part of the time which has elapsed since these tailzies were made, these estates of March and Neidpath undoubtedly (and the estate of Queensberry too) have been let on leases for such terms and upon such grassums as I shall have occasion to mention ; and it is a circumstance unquestionably of considerable weight, that leases of that nature were made by persons who stood connected with the heirs of tailzie, and holding judicial situations, from which it is fairly enough inferred, that they must have been acting upon their notions of what was the law of Scotland at the time.

Grassums
 upon leases
 taken by
 Judges who
 were tutors
 and curators.

When the late Duke of Queensberry came into

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QUEENSBERRY
LEASES.

Enumeration
of leases made
by the Duke of
Queensberry;
Harestanes,
Whiteside,
Alternate
leases,
Hallscar, &c.

possession, he seems to have done acts of which I shall say no more, than that his Grace appears to me to have intended to make as much of the estate as the powers he had would enable him to make, and no court of justice has a right to say that there was any thing wrong in that intention. The leases of Easter Harestanes and of Whiteside, the set of leases which have been called "alternate leases," and the leases sought to be affected at the suit of the Duke of Buccleuch, particularly the lease of a farm called Hallscar, are the most material to be considered. There are some other leases of minor note, which I shall not trouble you with in the detail of the facts and circumstances. They may be very easily disposed of, when you have determined what is your judicial opinion as to the others.

Case of Hare-
stanes.

In Neidpath
entail no ex-
press prohibi-
tion to grant
leases.

The lease of Easter Harestanes was granted under the Neidpath entail, in which it is declared, that the heirs of tailzie are not to *sell, alienate, wadset or dispone*, nor to grant infeftments of liferent, nor annualrent. There is no prohibition of any sort against granting leases; but the deed contains a permissive clause, by which "It is expressly provided and declared, that notwithstanding of the irritant and resolute clauses above mentioned, it shall be lawful and competent for the heirs of tailzie above specified, and their foresaids, after the decease of the said William Duke of Queensberry, to set tacks or rentals of the said lands and estate during their own lifetimes, or the lifetimes of the receivers thereof, the same being always set without evident diminution of the rental." The late Duke had granted a lease to Alexander Welsh of the lands of Easter

Harestanes for fifty-seven years. The entry of the tenant was at the term of Whitsunday 1791 ; the rent payable was 74*l.* 1*s.* sterling; and it was further stipulated, that the tenant should pay the sum of 300*l.* of grassum, or entry money. In consequence of proceedings * which had taken place before the Court with respect to a lease for ninety-seven years, under the same entail, Welsh brought an action of declarator against the late Duke of Queensberry, the late Francis Earl of Wemyss, and the late Francis Charteris Lord Elcho, his eldest son, as the next heirs of entail, setting forth, that as some doubts had arisen with regard to the validity of the lease, he had brought the action, to have it found and declared, that it was a valid and sufficient title in his person for all the years of its endurance then to run. The action having come before Lord Woodhouselee, the defenders were assolizied by an interlocutor of the 25th of June 1808 ; this lease for fifty-seven years, as the lease for ninety-seven years, being, in the judgment of the Court, prohibited by the prohibitory, irritant and resolute clauses contained in the entail of the Neidpath estate.

1819.

CASE OF THE
QUEENSBERRY
LEASES.Statement of
proceedings in
Court below,
in the case of
Harestanes.Fifty-seven
years lease
prohibited.

Lord Wemyss and Lord Elcho having both died, an action of transference was raised, and the suit was, to use our expression, revived. On the 6th of December 1809, the Lord Ordinary having considered the memorials for the parties, and whole cause, repels the reasons of declarator, assolizies from the conclusions of the libel, and decerns; that is, again stating his opinion that the lease was bad ; “ but he reserved to the pursuer, (that is the tenant,)

* In the Wakefield case.

1819.

CASE OF THE
QUEENSBERRY
LEASES.

Assets of the
grantor liable
on the war-
ranty.

“ his recourse upon the warrandice in his tack
“ against the Duke of Queensberry and his repre-
“ sentatives, in the event that the said tack should
“ be set aside, as *ultra vires* of the granter, in a
“ regular process brought for that effect.” The Lord
Ordinary was of opinion that the lease was good for
nothing, regard being had to the nature of the entail;
but that the late Duke of Queensberry having entered
into a warranty, his assets were answerable to the
tenant for such damages as would compensate him
for the loss of his tack: and as those assets will be
equally affected by his warrandice as to all the tacks,
it becomes a question of very great value as between
the parties in the cause; but the value is trifling,
compared with the extreme importance of the case,
as establishing a rule for the administration of
property.

Statement of
proceedings in
Court below,
in the case of
the Earl of
Wemyss v.
the Duke of
Queensberry.

After this decision the late Earl of Wemyss brought
an action of declarator against the late Duke of
Queensberry; in which he stated, that William Duke
of Queensberry, in the year 1731, made up his titles
under this entail, but notwithstanding the limitation
therein contained of the powers of the heir of entail
in setting tacks, he had set or granted tacks or leases
of different parts or parcels of the said lands and
estates, to endure for a longer term or period than
his own lifetime, or the lifetime of the receivers
thereof; and that the said tacks or leases had been
granted, upon payment by the tenants of fines or
grassums, and with diminution of the rental: he
then alleged that he was the heir of entail, and en-
titled to succeed to the lands and estates on failure
of the Duke of Queensberry, and the heirs-male of
his body; that the tacks or leases had been granted

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QUEENSBERRY
LEASES.

to the manifest prejudice of his eventual right and interest as heir of entail, and therefore he prayed that the Duke, and all those tenants whom he names, should be convened before the Lords of Council, and that it should be found and declared by their decree, that it was not competent to, nor in the power of the said William Duke of Queensberry, to set or grant any tacks or leases of any part of the entailed estates to endure for a longer period than his own lifetime, or the lifetime of the tenants receivers thereof, except in terms of, and under the provisions of the act for encouraging the improvement of lands in Scotland held under settlements of strict entail, nor to grant any tack of the lands and estate in consideration of fines or grassums, and thereby diminish the rental; and that all such tacks and leases so granted, either for a longer period than prescribed by the entail, (unless they are in the terms of the act of Parliament,) or upon the payment of grassums by the tenants, are void and null, and should be of no effect as against the heir of entail.

This action was remitted to the previous process of declarator at the instance of Welsh, depending before Lord Woodhouselee. A representation having been given in for Welsh against Lord Woodhouselee's interlocutor, there was another interlocutor pronounced: "Having heard parties procurators upon what is stated in the representation, the Lord Ordinary recalls the interlocutor complained of; and in respect the action of declarator at the instance of the Earl of Wemyss against the Duke of Queensberry and others his tenants is now remitted to the present process,

Joinder of processes.

1819.

CASE OF THE
QUEENSBERRY
LEASES.

Interlocutor,
12 Nov. 1812.

“ conjoins the processes ;” then there is the usual direction in that respect.

The Duke of Queensberry died soon afterwards.

There was an action of transference against his representatives ; and on the 12th of November 1812, the case having been then reported, the following interlocutor was pronounced by the First Division of the Court. “ Upon the report of the “ Lord President in place of Lord Woodhouselee, “ and having advised the informations for the parties, “ the Lords sustain the defences in the process of “ declarator at the instance of Alexander Welsh “ against the Earl of Wemyss and others, substitutes “ under the deed of entail ; and assoilzie the de- “ fenders from the conclusions of the libel, and “ decern ;” that is, the whole Court then concur with the Lord Ordinary, and hold that this lease for such a rent and such a grassum, and such a term, was not a good lease. Then they “ remit to Lord “ Hermand to hear parties on the conclusions of “ the libel for damages, and to do therein as he “ shall see just.” And with respect to the process of declarator at the instance of the Earl of Wemyss against the late Duke of Queensberry, and John Anderson and others, tenants of the tailzied lands and estate of Queensberry and others, they also remit the said process to Lord Hermand as Ordinary, in place of Lord Woodhouselee, to hear parties on the conclusions of the same as applicable to the cases of the several defenders, and to do therein as he shall see just. The interlocutor of the First Division of the Court of Session pronounces, that Welsh cannot sustain his lease against the persons who are

the heirs of entail; but the interlocutor on the declarator of the Earl of Wemyss against the subtenants, leaves the heirs of entail to proceed, in order to determine whether they can substantiate their declarator, against each and every of those tenants mentioned in that declarator; those tenants having leases which were of the same nature as those sought to be affected by that action of declarator.

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CASE OF THE
QUEENSBERRY
LEASES.

The case of Easter Harestanes includes two questions, the first, Whether a fifty-seven years lease is an alienation? you have decided that a ninety-seven years lease is an alienation;—and there are some decisions that leases between fifty-seven and ninety-seven are alienations:—another question is, What is the effect of the grassum which was taken in this case of Easter Harestanes?—that is a question common to that and the other cases: with respect to the duration of the lease—the fifty-seven years furnishes a question peculiar to that case.

Questions in
case of Hare-
stanes lease.
1. Duration
57 years.
2. Grassum.

The next case which was before the Judges of the First Division, was the case of the lease of Whiteside, and with respect to that lease, it was a lease for the life of the tenant. The rent was not less than the rent which was payable under the former lease, but it was insisted that this was a lease made for a grassum, and that therefore it ought to be reduced. The fact that it was made for a grassum, is a finding clear in the case. This farm had been let, together with two other farms; they were afterwards divided in the manner stated in these cases. There is no doubt that Whiteside, which is mentioned as having been let for the same rent, was let upon a grassum; and that the rent in this lease was affected by the

Case of
Whiteside.

1819.

CASE OF THE
QUEENSBERRY
LEASES.Proceedings in
Court below,
in the case of
Whiteside.

amount of the cess, and rogue and bridge money, with which it was not let by the former lease.

There was a special interlocutor, first of Lord Hermand, then of the Lords of Session, with respect to this lease ; and in order that the case may be fully comprehended and properly decided, it is necessary that the interlocutors should be read :

14 June 1814.

“ Having advised the condescendence and answers,
 “ in the process of reduction at the instance of the
 “ Earl of Wemyss and March against William
 “ Murray, and whole processes, conjoins this process
 “ with the declaratory action between the parties
 “ depending before the Lord Ordinary, in so far as
 “ the declarator is applicable to the present case :
 “ Finds it stated in the condescendence, and not
 “ denied in the answers, that the whole farms,
 “ whereof the leases are now under reduction, were
 “ formerly let by the late Duke of Queensberry for
 “ fifty-seven years ; and, with an exception stated
 “ by the defender of the lands of Flemington and
 “ Crook, under burden of grassums, the interest of
 “ which bore a considerable proportion to the yearly
 “ rent : Finds it admitted in the answers, that in
 “ or about the year 1807, many of the tenants hold-
 “ ing leases for fifty-seven years, *renounced their*
 “ *leases, and took new ones for periods equal to the*
 “ *terms unexpired of the old ones, but without pay-*
 “ *ing any grassums for their new leases ;* and that
 “ soon afterwards, the tenants of all the farms to
 “ which the present discussion relates, whether they
 “ had got new leases of the nature above mentioned,
 “ or had continued to possess on their fifty-seven
 “ years leases, executed renunciations, and accepted

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QUEENSBERRY
LEASES.

“ of the existing leases, for which they paid no
 “ grassums ; as also, that when the tenants re-
 “ nounced their former leases, and took the present
 “ ones, contracts were entered into betwixt them
 “ and the Duke’s commissioner Mr. Tait, as stated
 “ in the condescendence : Finds, that although it
 “ be stated by the respondent, that, depending on
 “ a contingency not explained, but said not to have
 “ existed, these contracts never were acted upon,
 “ yet they afford evidence to show, that the new
 “ leases were, with the exception of the term of en-
 “ durance, a *surrogatum* or substitute for those
 “ which had been renounced : Finds, that the rents
 “ payable under these renounced leases, must, of
 “ necessity, have been, from the inconvenience and
 “ loss arising to the tenants from the advance of
 “ money, a consideration of the doubts of the powers
 “ of the lessor, held out in the contracts and other
 “ circumstances, have suffered a greater reduction
 “ than the amount of the interest of the sums paid
 “ in name of grassum : Finds, that the entail
 “ founded on by the parties in this cause, contains
 “ a clause by which it is expressly provided and
 “ declared, that notwithstanding of the irritant and
 “ resolute clauses above mentioned, it shall be
 “ lawful and competent to the heirs of tailzie therein
 “ specified, and their foresaids, after the death of
 “ the said William Duke of Queensberry, to set
 “ tacks of the lands and estate during their own
 “ lifetimes, or the lifetimes of the receivers thereof;
 “ the same being always set without evident dimi-
 “ nution of the rental : Finds, that the rent pay-
 “ able under the renounced leases, diminished as it

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“ was by the payment of grassums, cannot be con-
sidered as constituting a fair rental, such as is
implied in the above clause : Finds, that the
lease under reduction, though it might be sup-
ported by the first part of that clause, as granted
for the lifetime of the receiver, is cut down by the
concluding part of it being set with evident dimi-
nution of the rental.” Then he repels the
defences.

Proceedings in
Court below
in case of
Whiteside.
3 Feb. 1815.

When this came before the Court, they pro-
nounced this interlocutor : “ They find, that the
entail in question contains a strict prohibition
against alienation ; but a permission to grant tacks
of the said lands and estate during their own life-
times, or the lifetimes of the receivers thereof,
the same being always set without evident dimi-
nution of the rental : Find, that in the year 1769,
the petitioner’s father obtained a tack of White-
side for nineteen years, at a rent of 109 *l.* for
which he paid a fine or grassum of 132 *l.* 18 *s.* 10 *d.* :
Find, that in the year 1775, the petitioner’s father
obtained from William Duke of Queensberry a
tack of the farm of Fingland for twenty-five years,
at the rate of 50 *l.* 10 *s.* for which he paid a gras-
sum of 480 *l.* : Find, that in the year 1788, he
renounced this lease, of which twelve years were
to run, and obtained a new lease, for fifty-seven
years, of the said farm of Fingland, and also of
the farms of Whiteside and Flemington, at the
rent of 260 *l.* 16 *s.* 4 *d.* being the amount of the
old rents payable under the former tacks, with
the addition of the cess, and rogue and bridge
money, amounting to 11 *l.* odds, for which he paid

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QUEENSBERRY
LEASES.

“ a grassum of 400 *l.* which was declared to be for
 “ Whiteside and Fingland only : Find, that in the
 “ year 1807, the petitioner’s father renounced the
 “ said tacks and took new tacks to himself and sons
 “ for their lifetimes, at the rents payable under the
 “ tacks renounced : Find, that this current tack
 “ must be held merely as a substitute for the former
 “ ones, and subject to any objections, on the ground
 “ of grassum, diminution of rental, or otherwise,
 “ which were competent against the tacks re-
 “ nounced : Find, that in estimating the rents of
 “ Whiteside and Fingland, the value of the fines or
 “ grassums paid at the commencement of the former
 “ tacks ought to have been added to the annual-
 “ rent : Find, that this was not done, and that the
 “ new rent was made the same as the old rent, *plus*
 “ the cess and bridge money : Find, that this was
 “ not equal to the value of the grassums taken, and
 “ therefore that the said last tack of Whiteside and
 “ Fingland was set with evident diminution of the
 “ rent, and in violation of the said clause in the
 “ entail : Further find, that the conversion of part
 “ of the new rent into a fine or grassum of 400 *l.*
 “ was to the manifest prejudice of the succeeding
 “ heirs of entail, and operated as an alienation *pro*
 “ tanto of the uses and profits of the estate ; there-
 “ fore, although the said tacks in point of endurance
 “ do fall within the permission of the entail above
 “ referred to, find that they are struck at by the
 “ clause prohibiting alienation, as well as by the
 “ condition in the said permissive clause against evi-
 “ dent diminution of the rent ; therefore, in the
 “ process of declarator, repel the defences ; and in

Decision as to
 Whiteside and
 Fingland, on
 the principle
 that the
 lease operates
 against the
 prohibition to
 alienate, and
 also is in di-
 minution of
 rental.

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“ the process of reduction, repel the defences, sustain the reasons of reduction, and reduce, decern “ and declare accordingly.” And there was an additional interlocutor with respect to the lease of Flemington, which it is not necessary I should state to your Lordships. The principle therefore laid down in the declaration is, that this lease operates against the prohibition of alienation, and also amounts to an evident diminution of rental.

Case of alternative leases.

With respect to Neidpath, there was a third case as to the alternative leases. I will state enough to show what is meant by that term. There was a farm called Edstoun. In the year 1731, when the Duke of Queensberry succeeded to the estate, it was rented at the sum of 83*l.* 10*s.* In 1756, the rent was raised to 85*l.* 12*s.* In 1769, it was let for nineteen years to Alexander Horsburgh and John Saltoun, at a rent of 149*l.* with a grassum of 193*l.* 7*s.* 4*d.* When that lease expired, a gentleman of the name of Symington obtained a lease for fifty-seven years from Whitsunday 1792; the rent stipulated upon that occasion was 155*l.* 7*s.* and the grassum 300*l.* In 1807, Robert Symington renounced his lease, and obtained a new one,—which is the lease sought to be set aside,—“ for the space of thirty-one years, “ and from and after the term of Whitsunday 1807, “ which is hereby declared to have been the term of “ the said Robert Symington’s entry, notwithstanding the date hereof; declaring always, as it “ is hereby expressly provided and declared, that in “ case it shall be found that the said William Duke “ of Queensberry is prevented by the entail of his

“ Grace’s estate of March, from granting a lease of
 “ the aforesaid subjects for the above mentioned term
 “ of thirty-one years, then, and in that case, this
 “ lease is granted for, and shall subsist, and be un-
 “ derstood to have, been granted for, the term of
 “ twenty-nine years, twenty-seven years, twenty-
 “ five years, twenty-one years, or nineteen years,
 “ from the said term of Whitsunday 1807, which-
 “ ever of the said several terms of years, from the
 “ said term of Whitsunday 1807, (short of the
 “ aforesaid period of thirty-one years), the Court of
 “ Session or House of Lords shall find to be the
 “ longest period of those above specified, for which
 “ the said Duke had power to grant a valid lease of
 “ the aforesaid subjects.”

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 QUEENSBERRY
 LEASES.

In the narrative of this lease, it appears to be a lease the duration of which is to depend upon the decision, when it is obtained, of the Court of Session or the House of Lords, whether it is to be a lease for twenty-nine years, twenty-seven years, twenty-five years, twenty-one years, or nineteen years. Now, according to the law of Scotland, there must be what they call an ish (that is a determination) to a lease : But no man living can tell what it is to be in this lease, until the Court of Session or the House of Lords have said in that or some other case what it may be. This is a lease, which one party says cannot be exposed to challenge, on account of a grassum being taken ; the other party says it can, and ought to be affected upon that ground. The Court of Session held at first, that the limit of the Duke’s power was nineteen years ; but they say the whole transaction is affected by that general fraud which affects the in-

Judgment of
 Court of
 Session.

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QUEENSBERRY
LEASES.

strument ; and that therefore, though the lease might be a good lease, notwithstanding the determination of it is uncertain, for some period stated in it, yet it is affected by the general fraud.

These are the cases which appear to me necessary to be stated. I pass over the minor cases.

Points and arguments in the three cases.

1. Harestanes.

The *points* with respect to these three sets of leases, may be thus shortly stated. First with respect to Easter Harestanes ; the lessees and the representatives of the late Duke of Queensberry contend, that the Duke had power to grant such a lease ; that the decided cases prove the power of granting such leases ; that the entail, according to its legal construction, does not prohibit granting leases for fifty-seven years, and that, whatever may be the case with respect to a lease for ninety-seven years, a lease for fifty-seven years cannot be objected to ; they say, that the rent being equal to the last rent reserved, is equal to that which the law requires ; and being equal to that which the law requires, that grassum is not prohibited by the entail, or by any implication, or by any fair understanding of the words in the entail. It was further insisted, that the lease was within the meaning of the statute of 1449, and that the act is in complete force at the present day ; though leases are not in the law of Scotland conveyances, but mere incumbrances on the fee or property, and only so made by the statute, inasmuch as the lessees cannot be ejected during their terms while they pay their rents. The words of the act are, " It is ordained for the safety and favour of the poor people that labour the ground, that they, and all others that have taken, or shall take lands in time to come

“ from lords, and have terms and years thereof,
 “ that suppose the lords sell or annailzie the lands,
 “ the takers shall remain with the tack until the
 “ issue of their terms, whose hands soever the lands
 “ come to, for sicklike mail (that is the same rent)
 “ they took them for.” And they say, that by virtue
 of this statute, the tenant of Harestanes paying a
 grassum, is entitled to his lease.

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 QUEENSBERRY
 LEASES.

Upon this statute, the effect of the word annailzie must be considered. We have decided, that a lease for ninety-seven years is void as an alienation. The present question is, how far that may apply as an authority to a lease for fifty-seven years.

Effect of word
 annailzie in
 the prohibi-
 tion, as oper-
 ating on the
 Stat. 1449.

The successor in the tailzie contended, that a lease of this endurance is prohibited by the entail; that any leases of extraordinary endurance are prohibited; that with respect to the statute of 1449, it authorizes only such leases as may be lawfully made, not such as contravene the prohibitions of an entail; that the lease is bad on various grounds, all of which they proceed to state, if made for a grassum. They contend, that the practice did not sanction such leases; and that practice, if proved to exist, could not sanction such leases.

With respect to Whiteside lease, the argument on one side was, that such a lease does not fall under the prohibition to alienate, because deeds of entail are by the settled rules of interpretation in the Scotch law *strictissimi juris*, and a prohibition to alienate, according to such rules of interpretation, does not extend to leasing, and when the entail is so interpreted, does not extend to a lease of ordinary endurance, though granted in consideration of

2. Whiteside.

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arguments.**

grassum ; that the lease being granted for a term, and at the rent permitted by the entail, the grassum worked no injury. They further contended, that a man who is permitted to let without diminution of the rental, if he lets without diminution of rental, does no injury to the person who is to take after him, because, if he takes no grassum, the person to take after him cannot complain ; and if he takes a grassum, he still takes that which he may take, and that there cannot be a complaint if the lease is granted for that length with a grassum ; that the rentals of White-side and Fingland were not, in the sense of the deed, diminished by the grassum being taken, and that therefore the lease cannot be said to be set with a diminution of the rental ; and further, they insisted that neither the Duke nor the tenants were guilty of any fraud in this matter ; that in his own particular dealing, the Duke was not, by the general and comprehensive deed he entered into with all his tenants, guilty of fraud upon the entail, if what fraud upon the entail is can be defined. Then they rely upon the practice ; they say all landed proprietors do, and for a very long period have let with grassum. As to the words, “ without diminution of rental,” they must be construed, they say, with reference to former leases, or leases immediately preceding ; that it was so with respect to church and crown lands ; that it has been so to a vast extent with respect to a vast number of estates ; that it appears by a long series of decisions, that such a prohibition to let with a diminution of the rental, did not prohibit the letting with grassums. They further insist, that if there was any irritancy, that irritancy might be purged.

The heir of entail, on the other hand, says, that the lease is comprehended under the prohibitions of the entail; that the construction which is put upon the word rental on the other side, is not the proper construction; that grassum is anticipated rent, within the meaning of the deed of entail, and that it is so when taken upon surrender of former leases; that such dealing with the estate is within the meaning of the words diminution of rental; that upon a lease, twelve years of which were unexpired, if the tenant renounces the lease, and takes another lease, extending the term twelve years, that the grassum taken for the first lease must have some operation.

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The tenant contends, that whatever may be the case as between the Duke of Queensberry's representatives as standing in his place, according to all the principles of law which ought to affect his case, he is the tenant, and ought to be considered as a third party; that he is a purchaser, that he is contracting onerously, that he is entitled by virtue of the statute of 1449, and he prays that, whether his lease is a good lease or not, the Court will not consider what the case of any other persons may be, because he happens to have a good recourse against the assets of the late Duke of Queensberry. Then he insists, that all the prohibitions must be embodied in expression, that there is no prohibition embodied in expression, and that the irritancy (if any) may be purged.

With respect to the alternative leases, as far as the points made on each side arise out of the facts of the case, they insist that those leases are bad, on the same grounds as all the other leases that are to be affected by a grassum; and they say it is impos-

3. Alternative
leases.

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LEASES.

sible that the law can be such, that when a lease is executed, neither the heir nor any body else who is to succeed him, can tell whether the lease is for thirty years, twenty-nine years, twenty-seven years, twenty-five years, twenty-one years, or nineteen years.

These include all the points with respect to the Neidpath estate.

With respect to the Duke of Buccleuch's case : That came before the other Division of the Court of Session, and the two Courts differ altogether in their views of the law on this most important question.

The Duke of Buccleuch's leases relate to the entail of the estate of Queensberry ; and without going through all the particulars of the leases which have been granted upon that estate, they may be represented generally as being *leases granted for long periods, grassums being taken upon those leases*, and first leases granted to tenants in those tacks which were current, or to strangers under the burden of the current tacks, and with obligations in both cases, to grant a new lease annually for nineteen years during the Duke's life. With respect to that species of lease, they say, that it is not only affected by the circumstance of grassums having been taken, but that it is to be considered as a lease for more than the Duke's life or nineteen years : they say it is a lease for the Duke's life *and* nineteen years ; to which it is answered, that is not a lease for more than the lifetime of the setter or for nineteen years, because, in order to make the lease good, there must be possession, and that the possession is a possession which at the death of the Duke of Queensberry must

Queensberry
leases.

Leases for
nineteen
years, with
obligation to
renew annu-
ally.

be referred to the lease then actually existing ; and in truth and in fact they say, whatever it may be, in semblance and appearance, it is nothing but a lease for the life of the person or for nineteen years.

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There is a second class of leases, where *the current leases had* actually expired.

There is a third class of leases granted without an obligation of renewal, but where the leases renounced were not near their natural expiry ; and there were other leases which were not granted till the previous leases had expired, but on which grassums were taken. The validity of those leases was not only discussed in the general case of the Duke of Buccleuch, but also in the case of one of the tenants. With respect to the tenant's right, he insisted likewise upon the circumstance, that he was an onerous purchaser.

In this case, the Second Division of the Court of Session declared the particular lease before them was good, and that the leases in general were good ; and in this state of things, the cause came before this House, when you were pleased to make a remit, which has brought before you the collective opinion of both Divisions of the Court of Session, by which it appears that there is great diversity of opinion among the Judges.

Judgment of
Court of Ses-
sion, Second
Division, and
remit.

One of the defences of the Duke of Buccleuch, in one of those actions, stated that " the deceased Duke of Queensberry succeeded to the estate of Queensberry in the year 1778, as an heir of entail under the foresaid deed of tailzie, and made up titles accordingly under the conditions therein contained ; but after entering on the possession of the estate, he

Defences and
argument for
Duke of
Buccleuch.

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“ did not, as the leases gradually expired, let the lands
“ at the just avail for the time, in terms of the entail,
“ but granted leases for nineteen years below the
“ true value, and in consideration of large grassums
“ received ; and after having continued this system
“ for a period of eighteen or nineteen years, during
“ which time he had consequently drawn a grassum
“ for the letting of every farm on the estate, not
“ satisfied with the slower mode of again exacting
“ grassums as the leases might periodically fall, he,
“ from the desire of speedily raising a large sum of
“ money to add to his great wealth, and with the
“ view of defeating the prohibitions contained in
“ the said deed of tailzie, thought fit, about the
“ year 1796, when the whole estate was under
“ current leases, which had been granted by him-
“ self, to form a device, without waiting for the
“ expiry of these leases, of letting anew the whole
“ estate, both for his own lifetime and for nineteen
“ years after his decease, and also in diminution of
“ the rental, contrary to the conditions of the
“ entail ;” and then it proceeds to state what the
Duke of Queensberry had done in pursuance of that
device, contending that it was a fraudulent use of
his power, and that there might be a fraudulent use
of the power of the heir of entail, although what he
did in the execution of this power might be within
the letter of the power under which he professed to
act. Then they say, “ that these were not proper
“ leases, but complex contracts, conveying away the
“ lands for a term of years, partly for yearly rent,
“ but in great part for a grassum or price payable to
“ the Duke himself, because they were granted for

“ a space longer than the setter’s lifetime or nine-
 “ teen years ; the obligation of renewal being part
 “ of the contract, and elongating the term of pos-
 “ session for which the lands were let ; and because
 “ the leases were not let for the just avail, but for a
 “ rent known and intended to be inadequate, and for
 “ less than that avail ; and because they were let
 “ with diminution of the rental actually existing pre-
 “ vious to letting them, the Duke having previously,
 “ by grassums, received an additional rent for the
 “ lands beyond that stipulated in these leases.”

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Upon the remit, two orders were made by this
 House, one with respect to the tenant, and the
 other with respect to the general cause ; which latter
 was, “ that the cause be remitted back to the Court
 “ of Session in Scotland, to review generally the in-
 “ terlocutor complained of in the said appeal ; and
 “ in reviewing the same, the Court is to have espe-
 “ cial regard to the fact, that this action of decla-
 “ rator is brought by the executors and trust-
 “ disponees of the late Duke of Queensberry, as
 “ such, against the heir of tailzie, seeking thereby
 “ to establish, unconditionally, all and each of the
 “ numerous tacks mentioned in the summons, and
 “ granted by the said Duke, in the manner and
 “ under the circumstances mentioned in the plead-
 “ ings, and is not instituted by any of the persons
 “ to whom such tacks are granted, nor are any such
 “ persons parties thereto : that the Court do re-
 “ consider the defences of the appellant, and espe-
 “ cially whether, in a question *between such parties*,
 “ the leases so granted ought or ought not to be
 “ considered as granted in execution of such device,

Terms of
remit.Dom. Proc.
July 10, 1817.

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“ as is alleged in the said defences; and if so
“ granted, whether the same ought to be considered
“ as granted in fraud of the entail, and are not such
“ as ought on that account, or any other account
“ appearing in the pleadings, to be held invalid, or
“ not to be sustained at the instance of the pur-
“ suers, as representing the Duke; and in reviewing
“ the interlocutor complained of, the Court do par-
“ ticularly also reconsider what is the legal effect of
“ the word ‘ dispoine,’ contained in the deed of
“ tailzie of the 26th December 1705, with reference
“ to tacks of lands comprised in the said deed; and
“ further, do consider what is the effect, with re-
“ ference to such tacks, of all other parts of the said
“ deeds which relate to tacks, having regard to the
“ endurance of such tacks, and to the fact of gras-
“ sums being or not being paid upon the granting
“ thereof, or paid upon the granting of former leases;
“ and all other the terms and conditions upon which
“ such tacks were made; and to the effect of
“ such grassums, terms and conditions, in reducing
“ the amount of the clear rent receivable by the
“ heir of tailzie; and to all the circumstances under
“ which the appellant has alleged, and it shall appear
“ that the late Duke of Queensberry granted all
“ such tacks.” And then this was addressed to the
Second Division,-- “ that the Court to which this
“ remit is made, do require the opinion of the
“ Judges of the other Division in the matters and
“ questions of law in this case in writing; which
“ Judges of the other Division are so to give, and
“ communicate the same; and after so reviewing the
“ said interlocutor complained of, the said Court do
“ and decern in this cause as may be just.”

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There are in print the opinions of all the Judges which have been taken in consequence of this remit. Upon these opinions I will make only this observation : I am either bound to suppose, that the question about the Duke of Queensberry's declarator, as contradistinguished from the proceedings of declarators in general, by the circumstances which are stated in this case, was not a question understood, or that it was a question thought of so little importance, as certainly not to produce information enough from those opinions, to enable those who thought that question of any weight, to look at them, to resolve any doubts they might feel.

There was no ground to attribute to me, that I felt a notion that an action of declarator was not the form in which the representatives of the late Duke of Queensberry could proceed in the Court of Session, in order to have it declared that these leases were good. I knew that was the species of action which would be brought in the Court of Session ; but the remit was made in the Duke of Buccleuch's case ; and the reason of making the remit in that form was, that in the proceedings of the trustees of the Duke of Queensberry against the Duke of Buccleuch, they not only sought to have these leases substantiated, but to be protected from all claims of damages, on the ground that they were good. Much of the contest in this case went on this ground, that whatever might be the effect of granting one such lease on the payment of a grassum, yet there might be such a conduct on the part of the heir of entail in possession, such a comprehensive and vast dealing, buying up the leases of tenants, making them renounce their leases, and letting all the lands

Observations
on the remit
and misunder-
standing of
the Court of
Session.

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LEASES.**

Question as to
fraud upon the
entail.

Distinction
between cases
of heir and
tenant.

upon such a general system, as to amount to fraud, and although it might be the most difficult thing in the world with respect to tenant *A.* or tenant *B.* or tenant *C.* to say it was a fraud on the entail, yet that there might be such a thing as a fraud upon the entail nobody in the course of that matter disputed. The question under these circumstances was, whether those who were the representatives of the late Duke of Queensberry had a right to interpose to have all those leases declared good instruments, although it might be very fit to know how far the lease of *A.* or *B.* or *C.* or *D.* was or was not connected with that system of fraudulent management, and whether, notwithstanding that system of fraudulent management, you could prevent a particular tenant having a declarator, if he was entitled to it in an action of declarator, that his lease was a good lease.

Analogous
case of Rox-
burghe feus.

In the case of the Roxburghe feus*, where the heir of entail having a power to feu such part of the lands as he should think fit, provided his grants were not made in diminution of the rental, &c. and the heir feued all the lands, taxing the casualties, the House of Lords decided, that this was making such a use of the power of entail, as a court of justice would not permit. As between the Duke and his tenant, if there were no other parties in the cause, you might decide in favour of the leases; but here there might be one principle, it was argued throughout, on which to contend against the Duke of Queensberry, yet a principle that would not enable you to contend against all his tenants, or most of his tenants.

* *Ker v. Roxburghe*, Dom. Proc. 18 Dec. 1813. MSS. and 2 Dow. 149.

When the Court of Session was asked, by the terms of the remit, whether the action was an action which he could have maintained, if it was made out that there was in the leases that device, and that fraud upon the entail which the Duke of Buccleuch insisted made part of the system of the Duke of Queensberry, I had not the least idea that it would be considered as a remit, desiring to be informed, whether a man could in the ordinary case proceed by action of declarator. The particular circumstances that led to that particular remit, were of some such sort as I have been alluding to; and I must say, that the remit in its nature has not been well understood, and that it has not received the answer which was expected.

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LEASES.Reflections on
the under-
standing of the
Court of
Session.

The majority of the Judges seem to have been of opinion, that these leases were good; that grassums could not affect them. And with respect to the word "dispone," the majority of them were of opinion, that the word "dispone" would have the same effect as the word "alienate."

After these proceedings, from this interlocutor, (this case embracing the general consideration, and the additional circumstance that there is an onerous purchaser,) the appeal now comes back to this House. The several points which seem to have been stated in the Courts below, and discussed, involving the merits of the question upon this remit, were, with very little alteration, the same points on both sides as before submitted to the Court.

Second Divi-
sion of the
Court of Ses-
sion, 10th Feb.
1818.

In the March and Neidpath entail, the clause about setting tacks is a permissive clause, that is, "notwithstanding the irritant and resolute clauses

L. C.
6 July 1819.

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“ above mentioned, it shall be lawful and competent
“ for the heirs of tailzie above specified, and their
“ forebairs, after the decease of the said William
“ Duke of Queensberry, to set tacks or rentals of the
“ said lands and estate during their own lifetimes,
“ or the lifetimes of the receivers thereof, the same
“ being always set without evident diminution of the
“ rental.”

In the Buccleuch entail, the question arises upon the prohibitory clause, that is to say, the clause against *disponing* in any manner of way whatsoever, “ except so far as they are empowered in
“ manner after mentioned.” The clause then which relates to tacks and rentals, is a clause that they shall not do so and so, it is therefore a prohibitory clause in the terms of it, but still seems to be in some degree permissive also, by the words “ except so far as they
“ are empowered in manner after mentioned.”

Rental of the
lands, teinds,
&c.

To the March and Neidpath entail, there is subjoined a paper which has this denomination :
“ Rental of the lands, teinds and others, lying
“ within the sheriffdom of Peebles and Selkirk *respective*, which did pertain to John Earl of Tweed-
“ dale, and John Lord Yester his son, and were
“ sold and disposed by them to William Duke of
“ Queensberry in liferent, and to Lord William
“ Douglas, his second lawful son, and their heirs
“ of tailzie therein mentioned, in fee, conform to
“ the disposition thereof of the date the 19th day
“ of October last,” and which has particular relation to this present rental. Then they state what the lands are let at. There is, first in the parish of Lyne, I think they call it, the sum or rent of 5,840 l. Scots ; then follows this, “ Paid out of this in sti-

“pend to the minister of Lyne, 466*l.* 13*s.* 4*d.* 1819.
 “Item, deduced for the teinds of Scroggs, CASE OF THE QUEENSBERRY LEASES.
 “66*l.* 13*s.* 4*d.*” the sum of the deduction so much;
 and then follow the words, “remains of neat rent,
 “5,306*l.*” They then proceed to state the rent in
 Peebles parish, where the sum of rent is 2,428*l.*
 6*s.* 8*d.*; “paid out of this of tack-duty to the parson,
 “66*l.* 13*s.* 4*d.*; to the vicar, so much;” there then
 rests of neat rent 2,348*l.* 6*s.* 8*d.* It is not neces-
 sary to particularize the whole; but it goes through
 the several items of property which yield rent, stat-
 ing the sum of rent, and stating what remains of neat
 rent, and then it concludes summing up the whole
 foregoing rental contained in the preceding four
 pages, which extends to the sum of 17,002*l.* 13*s.*
 10 pennies Scots, which I take to be the amount,
 not of what is called the rack-rents, but of the rents,
 making the deductions which give the quantum of
 the revenues.

According to the law of Scotland at the time when this tailzie was executed, in calculating the teinds, the estimate was made by looking only at the rent reserved, and no benefit was given in that valuation to those who were entitled to the teinds with respect to any grassums that had been taken; but at a period long subsequent to this, the Court of Session having reconsidered the statutes, with reference to this matter of teinds, put a construction upon the words* “the rents of lands constantly paying;”

Alteration in the law of Scotland as to the valuation of rent in respect of teinds.

* Originally by decreets arbitral of Chas. I. dated 2 Sept. 1629, upon submission by titulars, proprietors and other parties interested; ratified in Parliament by act 1633, c. 17. See the decreets, subjoined to the acts of the reign.

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and held, that under these words they were entitled to say that a grassum was worth so much with reference to the calculation of rent, and that, instead of estimating the teinds by the rent reserved, they would take a proportion of the grassum, though the land did not constantly pay that grassum, and consider as the rent not the rent which the land constantly paid, but the rent which they thought in justice they ought to consider it as paying as between the persons entitled to the teinds and the land-holder.

Doubt as to the authority of the Court to give a new construction to the words of the Scots statutes 1633.

This was a very just alteration as to any question between the parties entitled to these different species of property; but how the Court of Session, after their predecessors, for nearly a century together, had said that the statute afforded the rule, and the words were what they were to go by, could give a construction which the words do not bear, in order to reach the justice of the case, is a difficult question, which ought to have been discussed upon the remit, but has been altogether neglected. I am not saying, that because this has been done in a question between the person entitled to the teinds and the owner, that therefore it is applicable to heirs of tailzie and onerous purchasers; that is another question; but the question is material for this reason, that this alteration of the law, by necessary consequence reduces the clear rents of the March and Neidpath and Queensberry estates in a very serious degree.

Effect of Scots statutes 1685 and 1449 as to long tacks.

As to the question, what is the effect of the statutes of 1449 and 1685 taken together, with respect to a tack for fifty seven years; supposing, for argument's sake, that the March and Neidpath entail must be considered as prohibiting a tack of fifty-seven years

as an alienation, does the statute of 1449* afford any objection to the conclusion of law? My clear opinion is, that it does not. Whether entails before that are to be considered as odious or not, or whether the statute of 1685 is or is not to be considered as purging them of all odious qualities, it is extremely clear, that if the statute of 1685 authorizes the entail, and if the entail, by force of that statute, prohibits a tack of fifty-seven years as an alienation, it is impossible to say the statute of 1449 can prevent the effect of the statute of 1685.

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The statute
1449, does not
support a lease
prohibited by
a tailzie,
framed ac-
cording to the
statute 1685.

We have been told again and again, that we are to proceed on the matter upon that system of interpretation that he who runs and can read may fix instantly the interpretation; yet, notwithstanding all these dicta, and the representations of the great character of the heir of tailzie, most assuredly I may say, as to these decisions about estate tail, that those who have run and read, have felt very different convictions, and entertained very different feelings with respect to the interpretation to be put on what they have so read. Looking at the opinions of the Court of Session, it is very difficult to reconcile their opinions in a matter in which no two men who run and read it is said can differ.

It was stated at the bar, on the hearing of this case, that the present proceeding was not to be looked upon as a claim for damages against an heir of entail, or his representatives, on account of his having contravened the prohibition; that it was not

Observations
on the plead-
ings and the
necessity and
purpose of the
remit.

* By this statute for the encouragement of agriculture, leases, which before had been mere personal contracts, were established as *quasi* real rights against general heirs and purchasers of the inheritance.

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to be looked upon as a claim for sums of money, or rather as a repetition of rents unduly anticipated; but that it was to be considered as a case of a right granted to a third party, for valuable consideration, if effectual; and which could only be made effectual by the combined operation of the different clauses which the statute of 1685 requires in entails—that it was a claim founded in contravention, (which is important to be observed) and where therefore the operation with respect to the smallest part of the estate, if it could not afterwards be purged on account of circumstances, would extend to the whole estate: In such a case, where it was insisted that the generality or universality of the acts of the late Duke, constituted a species of dealing with the entail which (whatever name he might give to that dealing, or however he might characterize it) might with respect to him be looked at in a point of view in which it might not be capable of being represented to the mind in a question between tenant *A.* and tenant *B.* and others, and where the defences of the Duke of Buccleuch were defences founded on the allegation of devices which the law would not sustain, and where the summons demands (as it does in this case) not merely to have a judgment that these leases were good, but to have it declared by the Court, that, free of all molestation or interruption whatever on the part of the heirs of tailzie, the executors might take the personal estate of the late Duke of Queensberry, and dispose of it as they thought proper; and where the distinctions were drawn between tenants claiming as purchasers, and all this device, as it was called, on the part of the Duke: Before we proceeded to decide

Pleadings
against the
leases on
the ground
of fraud.

on a Scotch case of such a nature, it was surely expedient to know what the Scotch Courts thought of the case so represented; and for this purpose the case was remitted.

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If I am to look at the opinions of the Judges, in consequence of this remit, as amounting to this, that a court of justice is not to change the law, (and God forbid they should change it!): if I am to look at what I read in those opinions, as pointing out, that although the Duke of Queensberry has made deeds to the amount of three or four hundred, although he has made tacks, and taken large grassums, and procuring the tacks to be renounced, has let the lands again, and so covered the whole estate with these tacks, if I am to look at those opinions as declaring that he has not thereby exceeded his power, that he has only done what it was lawful for him to do, it is very difficult to imagine in what cases those who make claims against him can say, that what it was lawful for him to do he has fraudulently done.

Conjecture
as to the
opinions of the
Scotch Judges
upon the ques-
tion of fraud
on the entail.

We have, in our own law, cases, where men acting according to their powers, may abuse them as to the objects of the powers. These are difficult cases to decide, and the Judges should take care they are not misled by the idea, that because powers may be abused, there has been in the cases put abuses of the powers. A noble Lord*, in one of the cases of this kind, had a power of appointing a certain sum of money among his younger children under a settlement. He made an appointment to one of those children, who was at that time at death's door in a consumption. What was the object of this appointment? It was, that if the child died, the

Cases in Eng-
lish law of
illusory ap-
pointments.

* Case of Lord Sandwich. See 11 Ves. 479.

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Difference of
opinion on the
question of
fraud.

father should take out administration to that child, and claim the estate himself. That was according to the letter of the power ; but the Court said that should not be, because it was substantially an appointment to himself, and not to that child.

The Judges differ very much upon the point. Some of them are quite clear this was a device, and that it cannot be sustained ; others being of opinion that this was nothing more, in a great variety of instances, than a legal exercise of that power which the Duke had a right to exercise.

This remit has been treated as if those who had the honour of advising this House had really doubted whether the law of Scotland would permit such a thing in general cases, as bringing an action of declarator by the representatives of the deceased, to have the acts of the deceased cleared from all doubt, and difficulty, and controversy. Certainly your Lordships did not mean to express any such doubt.

Observations
on the
memorials.

In looking at the memorials which were presented when this judgment was to be applied in the Court of Session, I find what passed in this House treated in those memorials in a manner of which I know no example, and of which I trust I shall never see another instance. Your Lordships are in the habit, for the sake of assisting persons in doing justice to the suitors in the Court of Session, of endeavouring to put into the possession of those who are the agents of the parties all the doubts and difficulties which have occurred to your minds upon the subject. It is accorded as an assistance to those who are afterwards to discuss the points below ; but it never was intended, that when such notes are handed out to those who are to deal with the case below, they are to use them as

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if they were printed pamphlets, and to make observations upon them in the style, and tone, and temper, in which some of these memorials treat (and I think not very accurately either) what was stated in this House. No man entertains a higher respect than I do for the learning, talents and character of the persons whose names are subjoined to those memorials; but that is not a mode in which I can see a member of this House dealt with, without saying, I hope I shall see no other instance of it. The President of the Court of Session, upon this subject, says, “ I shall first consider the chief arguments on “ which this proposition is disputed by the executors, “ and that in such a lofty tone of scorn, and such “ a cry of danger to established principles, as almost “ to frighten one from daring to think otherwise.”

It is supposed, that those who advise your Lordships, have very little notion of the difference between an English entail and a Scotch tailzie, because I observed there seemed to be this difference between persons claiming under a Scotch entail, and persons claiming under an English entail; that leases of short duration, under a Scotch entail, have been sustained against prohibitions, and that that possibly might arise from the circumstance, that a person making an entail might be presumed not to mean to prevent ordinary leases being granted of the estate; although if the term “ alienation ” applies to leases at all, it is difficult to say why it is not to apply to those of short as well as those of long duration. A lease of short duration was by the Scotch Judges held good; whereas our Judges have held leases made by a tenant in tail as voidable, not as void. Upon reconsidering that question, I am at

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a loss to know on what else the difference depends, in the law of Scotland, between long and short leases. We have been told we are overturning the law of Scotland,—that we are beating down established principles and rules which have been established for ages. I shall consider it an injustice done to the country, if in any decisions of mine an attempt to change the law of that country can be found; but it may happen that persons may have very different opinions as to what is the law of a country.

Long leases
alienations by
the law of
Scotland at all
times.

In applying the word “alienation” in the Neidpath case, in construction, I am perfectly satisfied that whatever distinction there may be, (if there be a distinction) as to the effect of the word “alienation,” that word in all time has prohibited a long lease in Scotland. I formed that opinion upon the ground that the term was not now to be applied for the first time as prohibiting such a lease. If the law of Scotland be thoroughly investigated, it will be found there was no period when it was not an alienation. Holding that a long lease was an alienation, the next question is, Upon what principle,—for this is what I want to have sifted and examined—upon what principle is it to be said a short lease is not an alienation? The text books, and the authorities which decided the Wakefield case*, show that a long lease is an alienation; and it is now supposed, because they have said a long lease is an alienation, and have not said a short lease is an alienation, that it is to be concluded that a short lease is not an alienation; but I must find some principle on which the distinction has been made.—Now those who

Doubt as to
the principle of
distinction be-
tween long and
short leases,
on the question
of alienation.

* *Montgomery v. E. Wemyss*, D. P. Dec. 1813. MSS. and 2 Dow. 90.

contended for what is called strict interpretation in the law of Scotland with respect to entails, (and rightly, for I do not venture to trench on that principle of construction), say that alienation means something quite different from allocation; that alienation is the actual conveyance of a real right; that allocation is a personal contract for the use of the property, which by the statute of 1449, with respect to Scotland, is made a species of real right. But alienation, whether long or short, in essence, nature and quality, is exactly the same. A lease of nineteen years, and a lease of thirty-one years, do not differ as to their essential qualities and attributes. The one is no more an alienation, nor less, *prima facie*, than the other. The one is no more and no less, *prima facie*, an allocation. How long is too long for a lease, or how short is right, is quite a different question. If a short tack be sustainable according to the law of Scotland, which I take it to be unquestionably, and which (whether I can account for the principle on which it is so or not) I never will disturb (I think I can account for it upon a principle satisfactory to my mind) I wish to see what is the principle upon which other persons have seen the difference between a short tack and a long one.

It is said, and I agree it has great weight—what sort of a situation will you put all persons into, if you give a general sense to such words as “alienation” or “disponing?”—Perhaps it is a little too late to discuss that, after the general sense has been given, as far as leases are concerned. But it has been often asked, (and the papers in this cause go a great way to controvert the Wakefield case, but being settled we shall be bound by it,) How are we

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All tacks
alienations *pro*
tanto.

Length of
lease allow-
able must be
ascertained
upon entail, as
in case of
inhibition,
death-bed, &c.

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to know what this lease is to be?—How are we to know which is a long, and which is a short lease?—I never could bring myself to have any difficulty about that; and for this reason: If a lease was prohibited in any of these terms, you must travel with all the difficulties till you find the description of the tack.—How is it with respect to death-bed? *—How is it with respect to inhibition, † and other cases in which a distinction has been taken between leases of one character and the other, with regard to which the assertion occurs, that such and such leases are not to be endured?—It is quite obvious, that whenever a question arises, where, notwithstanding inhibition—notwithstanding death-bed—notwithstanding prohibition, leases have been made which *A.* says are prohibitory, and *B.* says are not, a Court of Justice must deal with them, and say whether they are so or not.

We have had these arguments at our bar, as if they were the most unfortunate people as to landlords; and yet, if you look at their tacks, they seem so to deal with their landlords, as we have been told; if we were to insist on landlords dealing with their property, we should place them in the situation of not knowing what they should do, or forbear to do. You are not to place persons under the harrow of those difficulties, if the instrument has not placed them there; nor are you to be astute to find, that the instrument has a meaning to subject them to such difficulties; but if, in the true legal construction, they are exposed to them, they must submit. The instrument under which they claim is

* See post p. 416, and notes.

† Gordon v. Milne, id. 7008; and Wedgewood v. Catto, Fac. Dec. 13 Nov. 1817.

the law by which they must abide. It comes, therefore, round again to the same question, if long leases be alienation, what is the principle on which short leases are allowed? That principle must be ascertained, with a view to see whether the same principle does or does not in any manner, and to what extent, apply to that which is certainly the great question in this cause, and which perhaps may be stated fairly to be the only question in this cause.

What is the effect of leasing, and in that sense alienating, provided the lease be long, and falls under the term alienation? What is the effect of that principle, or any other you can discover out of the fact of taking grassums on leases too short to be alienations; but nevertheless where, though in one sense there is no diminution of the rental, it must be admitted, on the other hand, there is a diminution of what might have been the profit?

There are some points upon which I agree with some of the Judges—in some cases with a majority of the Judges—and I have the mortification to differ from a majority of the Judges in others. There is one very important part of this case, which is pronounced, I think, as the judgment of them all, in the interlocutor of the First Division of the Court—that is, with respect to those leases (I lay grassum out of the question for the present) in which the late Duke of Queensberry, having power to set for lifetime or nineteen years, set for nineteen years with a covenant to renew. It is contended that was a lease he could not make within the meaning of the charter, as it amounts to a lease for the life of the receiver, and eighteen years after. If so, it appears to me to be a

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Questions in
the cause.

Leases for
nineteen years,
with covenant
for renewal.

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nineteen years,
with covenants
for annual re-
newal, good.

lease prohibited ;—but I go so far with those who lay down the principles of strict interpretation of entails as to say, I have no doubt the Duke might, without covenant, from time to time take a renunciation, the effect of which would have been the same. Then the question is, does the obligation to do so, make any difference in a question between him and the heir of tailzie ?—I think not ; for this reason, that whenever the Duke happened to die, the possession of the tenant must have been under the lease that actually existed. With respect to the covenant for another lease, it is a mere personal contract, upon which it appears to me there could be no possession. According to the manner in which these tailzies are constructed, that is not to be denominated a lease or a tack for the whole of that period ; entering into an obligation which does not fix itself by way of lease on the heirs of tailzie, would not affect the legal or equitable right *ultra* that of the person who grants the lease, and his power to grant. So it was decided in this House, in that case of *Leslie v. Orme*, where upon the main question a lease for four nineteen years was sustained ; yet with respect to a reversionary lease, where there could be no possession during the life of the heir of tailzie, the House held it to be bad.

Whether taking the teinds affects the transaction, is a distinct point ; taking a grassum cannot affect it in any other way than in a higher degree. There can be no doubt, that, generally speaking, a man would give more of grassum, if grassum can be legally taken for a lease of this sort, with such a covenant, than for a lease without ; but in that point of view the question by which the lease is to be affected, is not upon the duration of the lease, for as a lease it has

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a duration for nineteen years only—it is not upon the effect of the covenant, for the covenant does not bind the heir of tailzie; but it is upon the effect of receiving that sum of money, which they contend, on the other hand, ought to be considered as rent, and not as grassum. Upon that part of the case, therefore, (omitting now the question of grassum) notwithstanding the effect which this sort of covenant has, and an effect which I should strongly conjecture was intended throughout these transactions; yet I am not at liberty to act upon any thing beyond the legal effects of its character; and if it is not prohibited by the charter, I trust this House never will make law, where they are acting in that department of their functions which belongs to interpreting law, and not making it.

The tailzie of the March and Neidpath estates has been adjudged* to prohibit long leases. The word “alienate” occurs in the Buccleuch case in different parts of it, but here also I take it to be clear law which never must be departed from—I mean, unless it is authorized by decisions—that when the statute of 1685 has required prohibitory clauses, irritant clauses, and resolute clauses, those who state there is an effectual prohibition against onerous purchasers, must find the terms in which the prohibition is conveyed in all those clauses. Now it is quite clear that the word “alienate” is not in some of the clauses in the Buccleuch case; and that introduces another question in this case, likewise of considerable importance. Those who have had this charter to inter-

Sense of the
word dispose.

* In the *Wakefield* case, D. P. 1813. MS. and 2 Dow, 90 and 206, et seq.

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pret, may have given a sense to the word "dispone," which I cannot give to it; and if that sense of the word "dispone," which in my conscience I think belongs to it according to its meaning in the law of Scotland, is adopted by the House, it will affect not only this case of the Duke of Buccleuch, but some others which have reached judgment in the Courts below, and some of which are now before the House on appeal. But whatever may be the effect, it is our duty to give it the sense which belongs to it.

"Dispone"
equivalent to
"alienate."

Upon the question as to the word "dispone," according to its sense in the law of Scotland, whether it is equivalent to the word "alienate,"—I have again and again read this case and all the former cases—I have again and again taxed myself to the duty of considering what is the meaning of this word "dispone," as it has been understood in text writers, in charters, in writs, in statutes; and in many of them, I am of opinion, that the word "dispone" is as effectual to prevent a lease of a hundred years, as the word "alienate" is.—That is my opinion. It would be pedantry in me to read all the doctrines which led me to express that opinion which I, for one, entertained on the word "dispone;" and I have the satisfaction to see, that the Judges below were not so much disturbed by that opinion, as they were by our notions of alienation in other cases.

The word "dispone" does not apply to leases as to duration, it only applies to leases in respect of grassums; and therefore it clears the way to the consideration, what is the effect of a grassum? because, if you held that the word "dispone" would not authorize such a decision as the word "alienate"

would authorize, it would have been difficult to get at the interpretation.

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Question whether heir of tailzie, where there is no prohibition, can diminish the rent.

When this case was argued here before the remit, there was no argument at the bar, nor any thing in the papers, which induced the raising, much less the discussion, of a question, whether an heir of tailzie, where there was no prohibition, could diminish the rent? Whether he could let below the last coming rent? I now see (and that makes this case of infinitely greater importance than I understood it to be then) that it is introduced as a question by no means determined, although the notion that an heir of tailzie had no such power, was founded upon the opinions of great and eminent lawyers, and those who now quarrel with that doctrine were the persons who brought those opinions here for the assistance of this House. I think there is *one judgment** at least, in which some Judges of great eminence in Scotland have gone the length of saying, that if the rent was lessened, particularly, if much below what it was, (and see what a state of law you are getting into, *much and little, long and short*), that they should hold that to be fraudulent. From this it appears, how very dangerous it is to determine any thing not before us for judgment; and it becomes necessary to consider, if it be the law, that a tenant in tailzie cannot let below the rent, independent of actual terms of prohibition, on what principle that is said to be law. It cannot be the law on strict construction, because there is nothing on which to put it; and therefore it must arise out of some principle, of which we ought to satisfy ourselves.

If heir of tailzie so restricted, query on what principle.

* The Wakefield case, see *post*. 417.

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Implied
prohibitions.
Mansion,
Policies, &c.

In these papers, much is also said about what are supposed to have been treated as implied prohibitions. I cannot charge myself as the first to denigrate the cases of the Mansion-house, of Policies of illusory rent, and other cases, as implied prohibitions. I expressed a doubt as to the proposition which was so broadly stated in argument, that a tenant of tailzie was “absolute monarch*” of his estate in every particular where he was not bound by express prohibition. I now venture to observe as to the law respecting the Mansion-house and the Policies, that if they are not implied prohibitions, I may take the liberty of stating them to be something like limitations of the powers of an absolute monarch. What is the principle here which binds a tenant in tailzie, although restricted by no words in the charter. When the act of 1685 gives a man power to comprehend in tailzie all he chooses to comprehend in that tailzie, and where he does comprehend the Mansion and the Policies, and where the prohibition does not strike at the Mansion-house and the Policies—what is the principle, I say, on which it has been held, both below and in this House, (particularly in the Roxburghe case—a case which may not form any precedent to decide this, but in that case in effect, if those feus had been held good, it was reducing the mansion-house of Roxburghe to the state of a stone quarry) that such a dealing as to the Mansion-house and policies was illegal, though not expressly prohibited. Such is the effect of the decisions, though I am not able to

* An expression frequently used in the argument for the appellant, as to the powers of an heir of tailzie, so far as he is not expressly restricted by the prohibitory, &c. clauses of the entail.

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satisfy myself on principle, why tacks of these Mansion-houses and Policies ought not, by the statute of 1449, to be made good, as against the future heirs of tailzie. I wish those who put it upon that ground, would tell us, why the act of 1685, if it authorizes an entail in terms which comprehend them, being subsequent to 1449, will not, upon the face of what is embodied in the expression, just as much affect the Mansion-house and Policies as other subjects. We must endeavour to ascertain what is the principle of the exception before the present appeal is decided.

So as to the cases of illusory rent, if I am to look at the statute of 1449, and what some of the Judges have said on that statute, I find it extremely difficult to say what is an illusory rent. There has been an attempt to determine what is illusory, but our decisions do not supply the principle upon which we can determine that to be illusory, provided we read the statute of 1449, as giving the power by which the effective lease is granted. When, therefore, this is stated to be an implied prohibition, and to be an implied prohibition destroying all the effect of strict interpretation, I ask those who say that nothing is out of the power of an heir of tailzie, except what is put out of his power by the intention and meaning of the entail, embodied in actual expression, to show how they account satisfactorily for the cases to which I have alluded. They may account for them very satisfactorily, for aught I know, upon the doctrine which lays this down as a general rule, without any exception whatever; and yet, on the other hand, I have been quite unable to discover what is the prin-

Illusory rent.

Prohibitions
implied on
principle of
presumed
intention.

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ciple which takes it out of that rule, unless it be some important principle arising out of the presumed intention of the author of the tailzie, that this shall not be done, whatever may be the apparent import of the expressions which he has used in his tailzie.

The great and important question remains, and undoubtedly it is a great and important question in every view that can be taken of it, if the doctrine with respect to grassums is allowed. If taking grassums is not to be considered as "*evident diminution of rental*," which are the words to be construed, we see what may be done with respect to estates tail in Scotland. We may indeed be surprised at what has not been done with such estates. . On the other hand, if you do hold that taking grassums is, in the sense in which I speak of it, prohibited, you deny legal effect to acts which have been sanctioned by practice, and defeat the provision and the means of providing for wives and children; but, much as such consequences might be deplored, we cannot, with a view of avoiding them, venture, in judicial decision, to declare that to be the law which is not so. Those evils must be remedied, if necessary, by the Legislature. The question, therefore, comes round to this, What is the effect of grassums with respect to such leases as have been granted under these entails, having due regard to the principles of interpretation, as affecting the construction of these deeds; having due regard also to what has hitherto been done in practice, and to what has hitherto been established by decision?

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It has been intimated to me, that the teinds in one of these estates were valued about the year 1720;

it does not appear to me in the view I take of this case, to be a circumstance that varies the principle on which we are to decide this case: because, one of those entails being made in 1705, and the other considerably before 1700, the circumstance of an after valuation of the teinds, would not shut out the consideration of any construction the Court of Session put upon that entail, either upon the interpretation of these deeds of entail, or any other deeds of entail. I have not forgotten that there may be, as contended, a very great difference between the rules of construction, as they may be applied to lands generally, and proprietors of teinds, and as they may be applied to heirs of entail; the rules have come very often under consideration, and I should be very sorry indeed if, in the result, we should not duly consider them.

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LEASES.Valuation of
teinds.

With respect to the meaning of the word *dispone*, I found my opinion, not only on what I conceive to be the legal sense of the word, as contradistinguished from that strict and peculiar sense which belongs to an instrument known to the Scotch law by the name of disposition, but on looking at the meaning of the words *dispone*, and *dispose of*, in the two deeds of entail under our consideration, and all the parts and clauses of both the deeds, containing the words “dispone,” and “dispose of,” and “dispone upon,” and “dispone thereupon,” and so on.

Dispone and
dispose of.

I understand there has been a decision* of the Court of Session subsequent to this, by which a different construction has been put upon the word. There was a great difference of opinion upon it, and that with respect to setting tacks. In the case of The Earl of

Dispone.

* Elliot v. Pott, March 10, 1814.

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Elgin v.
Wellwood.

Elgin v. Wellwood, now pending, on appeal *, the same point came under discussion. In that case, upon the 9th of October 1807, a proposition was made in a letter, the terms of which are as follow :—“ On the part of the Earl of Elgin, I hereby offer to enter into a lease with you for 999 years from Martinmas next, of the farms of Wankirclu and Greenhill, possessed by Thomas Purves, excepting that part thereof lying on the north side of the road from North Queensferry to Torryburn of Craigs;”—the rent is a peculiar sort of rent, three bolls of oatmeal per acre, besides “ a grassum of 12,000 l. sterling, bearing interest from Martinmas next, but the grassum not to be payable during your lifetime.”—The grassum, therefore, was to be paid at a subsequent period.—“ It is understood, that Lord Elgin is in the mean time to find security for that sum to the satisfaction of Mr. Thomas Adair, writer to the signet;”—and then there is a provision with respect to the quantity of acres;—“ and it is further understood, that by your acceptance of this offer, you agree to enter into a lease with Lord Elgin for the same period of years, at the same rent, and for a grassum in proportion to the extent to be fixed, according to the grassum now offered, of all the land lying to the west of Pitliver House, and belonging to you, which you are at liberty to let for that period of years, in terms of the entail of your estate, but this only in case his Lordship should incline to enter into such a lease.”

The power of leasing under the tailzie, in that case is expressed in these words : “ and with this power and faculty, as it is hereby expressly pro-

* Since decided against the appellant. D. P. cases of 1820, *post*.

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“ vided and declared; notwithstanding of the restric-
 “ tions before written, with regard to the setting
 “ tacks, that the said Robert Wellwood, my son,
 “ and each of the heirs succeeding to the said lands
 “ and estate, shall have full power to set tacks of
 “ the same, excepting the house, offices, houses and
 “ gardens of Pitliver, and one hundred acres of
 “ ground next adjacent, and contiguous to the said
 “ manor-place, for such space of time as they shall
 “ *think fit*, provided that the same shall never be set
 “ at a smaller yearly rent than three bolls of oat-
 “ meal, at eight stone weight per boll, for each acre
 “ so to be set, and proportionably for any smaller
 “ quantity; and which rent or tack-duty shall
 “ always be payable in kind, and never be converted
 “ into money: Declaring, that in case the said
 “ Robert Wellwood, my son, or any of the said heirs
 “ of tailzie, shall set tacks of the said estate for any
 “ longer space than nineteen years, or in terms of
 “ the act of Parliament before mentioned, except in
 “ the terms of the clause immediately before written,
 “ then such tacks shall be in themselves null and
 “ void;” and there were the usual resolute and
 irritant clauses. The general power was, “ to set
 “ tacks or rentals of any part of the estate, except
 “ that they were not to do that (except in the terms
 “ after mentioned) for a longer space than nineteen
 “ years certain, or for the life of the setters, or in
 “ the terms of the power given to the proprietors
 “ of entailed estates in Scotland; and that none of
 “ the tacks or rentals shall be set *with diminution of*
 “ *the rental*, except the same be done without col-
 “ lusion, and by way of public roup, to the highest
 “ bidder;” a material passage in this case, as having

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Elgin v.
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999 years,
whether a
tack.

some application to the entails now under your Lordships consideration.

The Court below were of opinion that this tack for 999 years is a good tack ; and the question to be discussed, whenever that cause comes for decision, will be of two kinds ; first, with respect to grassum, upon which I observe, in the note I have taken, the counsel at the bar stated, not one word was said in the Court below ; the next question will be, Whether a 999 years estate is really a tack ? whether it is in Scotch law a tack ? The Court were of opinion, it was a tack, under this power to set such tacks as the heir of tailzie thought proper, that this 999 years could be sustained. It was argued at the bar, that it was no such thing as a tack ; and you will have to decide whether 999 years is to be considered as a tack under this power and faculty ; and if it is, what is the effect of the grassum ? I have thought it my duty to mention that case. Though it is a case subsequently decided, it contains the opinion of the Court of Session. It has so much of authority, (though subsequent to the case before your Lordships), as belongs to a case that is under appeal.

Harestaness
lease.

The Harestaness lease has been reduced and declared to be null, by the First Division of the Court of Session, upon two grounds, *first*, upon the ground of its duration ; *secondly*, upon the ground of the grassum. If it is a bad lease on the ground of duration, it would not be necessary, in that case, to show whether it was a good or a bad lease on the ground of grassum ; but if you hold it to be a good lease, notwithstanding it was for a duration of fifty-seven years, then it will become material to consider what

is the effect of the grassums. That consideration may be as well blended with the consideration of what belongs to the *Whiteside* case, as taken separately. With respect to a fifty-seven years lease being an alienation, in the *Wakefield* case it was decided in this House that a long lease was an alienation, confirming the opinion of the Court of Session, notwithstanding the practice in Scotland of granting such leases to a very great extent.

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LEASES.Long leases an
alienation.

On looking at the grounds of the opinion, that a ninety-seven years lease was an alienation, and was not a tack, it appears the Court held, that according to the law of Scotland, except so far as the effect of the statute of 1449 is to be considered, a lease, though quite different from an infeftment, a disposition, and so on, and quite different from an alienation understood in the special sense of alienation, that is, a transfer of property, that a lease, although it is in truth nothing more, either in the law of England or in the law of Scotland, than a personal contract for the possession of land not transferred to another, and converted only into a real right, so far as the statute of 1449 does convert it into a real right; yet they were of opinion, not on any speculations of theirs, but on doctrine as it was to be found in their books, in their statutes and instruments, that a long lease was an alienation; and, when you look at what is to be found with regard to particular heads of law in the law of Scotland, (though I am not now stating this to afford a direct inference with respect to what should be the construction of a tailzie,) you will find that, with respect to forfeiture*, for instance, a long

Leases only
personal contracts for the
possession of
land.How far converted into
real rights by
Scots Act
1449, *quære*.In respect to
forfeiture, long
lease, or grassum, an alienation.

* See *Home v. Oldhamstocks*, Dict. of Dec. 4684.

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lands and
crown lands.Long lease an
alienation, be-
cause not of
ordinary en-
durance, nor
in proper ad-
ministration of
the estate.Whether the
lease is too
long, the same
in the cases of
forfeiture, &c.
as in the case
of tailzies, yet
those have
been and must
be made the
subject of
judicial inves-
tigation.

lease is stated to be an alienation,—that with respect to forfeiture, if there is a grassum *, it is stated to be an alienation. So again with respect to deathbed †, —so in respect to crown lands ‡, and church lands §, they have laid down in the language of their law, that a long lease is an alienation; and they give a reason for that, upon which many of the Judges proceed in their opinion in the Wakefield case. The reason which they give in the case of forfeiture that a long lease is an alienation, is because it is not of ordinary endurance, and because it is not a necessary and proper administration of the estate. Whether you are to apply this principle to deeds of entail or not is another matter. Great stress is laid on the difficulties which persons would be placed under, if you were to construe powers of leasing with reference to what is a necessary and fit and proper administration, I find the law has distinctly pointed out a variety of cases in which you cannot escape from that principle of construction. So it is in the cases which I have mentioned. In other cases also, they have held leases void, unless they were adapted to the necessary and proper administration of the estate, as, if they were too long, for that is the instance which they particularly point out, and therefore wherever a question arises whether the lease is too long, or in other respects such as to fall within the reach of that principle which would aim at its destruction, it must

* Dalziel v. Caldwell, Dict. of Dec. 4685.

† Chrystisons v Ker, Id. 3226; Bogle v. Bogle, Id. 3235.

‡ Upon the question of alienation see Stair's Inst. l. 2, tit. 2, s. 25, and l. 3, tit. 3, s. 30; Craig, l. 2; Dieg. 10, e. See also a case as to tacks of Crown property, with diminution of rent, A. v. B. Dict. of Dec. 7854.

§ A. v. B. Dict. of Dec. 7938.

necessarily become matter of judicial investigation, whether it is a lease of that description or not.

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LEASES.

Sir Ilay Camp-
bell's opinion.

Sir Ilay Campbell, upon the first advising and decision of the Wakefield case, says, "Long leases are
" alienations, and leases of ordinary endurance are
" not alienations. My opinion is just that of all your
" Lordships. All of us know, *first*, that a lease
" may be granted by an heir, which is not an alien-
" ation; and, *secondly*, that a lease may be
" granted which is really, substantially and truly an,
" alienation. Now it is unnecessary for me to
" bring under your Lordships view, examples of the
" two extremes, because they must be obvious; for
" leases for one year or two years, or in Craig's time
" for ten years, or in the present day for nineteen
" years, are not alienations. But, on the other
" hand, will any man say with candour, or is it pos-
" sible for a lawyer to maintain, that a lease for a
" thousand years or ten thousand years, for *some-*
" *thing much below the present rent*, is not an
" alienation?" The difficulty commences when we
come to inquire what is *long* and what is *short*,
and what is *too long* and what is *too short*; and we
find on this grave authority (for undoubtedly that
of Sir Ilay Campbell must be taken to be a grave
authority, he being Lord President of the Court at
that time, and having great occasion to consider
these subjects), a judicial opinion, that nineteen
years is not too long to be a lease, and not an aliena-
tion. This doctrine of Sir Ilay Campbell led me on
a former occasion to say, "upon what particular
" ground they found that he (the tenant) was to
" have a lease for nineteen years, I am not able to
" learn from the papers before us. I take for

Nineteen years
a lease, and
not alienation.

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“ granted, they must have gone in some measure
 “ upon a notion, that as upon a species of *præ-*
 “ *sumpta voluntas* a tenant in tail may make a lease
 “ for nineteen years, (whether with grassum is
 “ another question), the Duke of Queensberry could
 “ make a lease for nineteen years; and it is the law
 “ of Scotland, as I understand it, upon this head of
 “ *præsumpta voluntas*, that a nineteen years lease
 “ being considered (whether tacks of longer endu-
 “ rance can or cannot be said so to be) to be an act
 “ of necessary and ordinary administration, necessary
 “ for the cultivation of the land, that such a lease is
 “ good. The Court seems to hold that doctrine
 “ somewhat upon the principle which the courts of
 “ law in England have applied to leases granted by
 “ tenants in tail before the statute * about their leases,
 “ but with this difference, the Courts in Scotland I
 “ understand held the nineteen years lease to be
 “ good, as of the ordinary endurance; upon the
 “ grounds of policy and husbandlike management of
 “ the estate, the Judges in England would not hold
 “ a lease made by a tenant in tail for a term that
 “ endured beyond his life to be *ipso facto* void, but
 “ they would hold it voidable, if the heir of entail
 “ chose to have it voided;” and upon this sort of
 expression falling from me, it has been supposed
 that I had totally forgotten the difference between
 the heir of tailzie in Scotland and the heir of entail
 in England.

Difference be-
tween heir of
entail and heir
of tailzie.

That an heir of tailzie in Scotland differs from an
 heir of entail in England in some respects, could not
 be unknown to me. An heir of entail in England
 has an estate that may endure for ever; an heir of

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tailzie in Scotland is the absolute fiar of the estate. Undoubtedly the whole fee is in him for the time. Those who may take after the heir of entail in England are considered as being remainder-men, having part of that fee which is vested only between the English heir of entail and the remainder-man. But since the whole fee, after the heir of tailzie is served heir of tailzie, is in that heir of tailzie for the time being, I ask, how it is that a lease beyond nineteen years is bad, and a lease of nineteen years good? It appeared to me impossible to decide, with any sort of justice, that there was any thing in the word *nineteen* that would make that lease rational, or that there was any thing in the words *fifty-seven*, or in the words *twenty-seven*, that would make the lease irrational. In every text writer, and in all the decisions in which it is stated that a *long* lease is an *alienation*, it is put on the ground that it is a dealing with the estate which is not for the proper and necessary management of the estate; but when they repudiate the longer leases as not being necessary for the proper management of the estate, and when they do that in the case of estates tail as well as other estates, to be sure I was led to think, that when they gave that reason for the destruction of long leases, they meant to say, that the short leases they sustained were to be sustained, because that reason which destroyed *long* leases did not apply to *short* leases. That is the only rule which I can find; and I was perhaps misled by the manner in which our own books treated this matter about the leases of tenants in tail, where they seem to have gone upon very much the same principle.

Long lease
void, because
not for neces-
sary manage-
ment.

This principle
not applicable
to short leases

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Rule of English law as to leases granted by tenant in tail, after the statute *de donis*. Bacon's *Abridg.* tit. Leases.

In a Treatise upon Leases, which I believe was written by Lord Chief Baron Gilbert, and certainly is one of the best compositions on leases we have in our law, he says, "If a tenant in tail, after the statute *de donis*, had made a lease for years, and died, this lease was not absolutely determined by his death; but the issue in tail was at liberty either to affirm or avoid it, as he thought fit; and the reason why such leases for years were not holden to be absolutely determined by the death of the tenant in tail who made them, was either"—(see now how near this comes to a Scotch tailzie)—"because they were drawn out of an estate of inheritance, which by possibility might continue for ever; and this was but a reasonable liberty given to the issue in tail, because it might well be supposed that his ancestor was not qualified to keep all his possessions in his own manurance and occupation, but must necessarily let them out to farmers and husbandmen, who, by their skill and understanding in the arts of agriculture and husbandry, would be best able to preserve and improve the soil, and by their yielding an annual rent or income to the lessor or tenant in tail himself, would enable him equally to provide for the necessities and exigencies of himself and his family." Our Judges, who have not the power which belongs to the Judges of the Court of Session, upon this principle of policy would not hold the leases absolutely void, but voidable. The estate tail, being an inheritance which might endure for ever, was an estate out of which a nineteen years lease might be drawn. If the issue in tail, or those to take after

them, chose to complain of the lease, the Judges held it void ; if they did not complain, upon that sort of policy which is, it seems, more open to the Court of Session to act upon than our Judges, they held them voidable. It was in this way I was led into this view of the case, whether it was a proper or an improper one.

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A paper was handed up to us, stating a great deal both with respect to leases and with respect to grassums, from the same learned person, Sir Ilay Campbell. You will see his authority both for and against any opinions that may be expressed to you to-day ; and I consider it a document which sustains again the doctrine that long leases are bad, and that short leases are good. That imposes upon us the task of finding out what are long and what are short, and impels us to find the principle upon which the one is held *good*, and the other is held *bad*. In that paper it is stated, that “ a lease without an ish at all is not good against singular successors, because it is truly not a lease, but an alienation of the subject, in an incomplete personal form, which cannot be sustained against an infestment. Suppose then that it is for a limited term of ten millions of years, can this be sustained ?—It is impossible. This may be said to be an extreme case on the one side, and a lease for two or three years is an extreme case on the other side. The thing desiderated is to fix a precise line. This is a hard task to be imposed upon Judges, and is much fitter for the Legislature ; but till a new law is made, they must necessarily exercise their powers of discrimination according

Opinion of
Sir Ilay Campbell
as to
leases under
tailzies and the
stat. 1449.

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“ to the best lights they can obtain upon the sub-
 “ ject. The act of the 10 George III. certainly
 “ does not decide the question, because it relates
 “ only to cases of entailed property where the tailie
 “ contains special clauses limiting the power of
 “ granting leases to a small number of years ;”—(I
 doubt whether that is correct ; because if it was
 intended that that act should apply only to such
 cases, there should have been a provision limiting
 its operation to such cases ;)—“ but it contains a
 “ principle which deserves to be attended to, viz.
 “ ‘ We are willing to extend your power of leasing
 “ under certain conditions beneficial to the entailed
 “ estate ;’—(Now what the meaning of this act was,
 I think Sir Ilay Campbell must know as well as any
 man in the kingdom ;)—“ but not beyond a certain
 “ moderate and reasonable endurance ; because if
 “ you go farther, this might be held as bordering
 “ too nearly upon alienation, and exceeding the
 “ ordinary power of rational administration. Thirty-
 “ one years or two lives are generally reckoned very
 “ moderate terms, yet the Legislature seems to have
 “ been afraid to go farther, even when the interest
 “ of the entailed estate was to be forwarded, unless
 “ in the case of building leases, which were to be
 “ allowed for ninety-nine years. It was upon this
 “ ground that I could not venture, in giving my
 “ opinion as a Judge in the first of these Queens-
 “ berry cases, to go farther than thirty-one years as
 “ a moderate endurance. I shall be better pleased
 “ with thirty-eight ; neither should I object to fifty-
 “ seven years, in cases under the act 1449 ; but to
 “ go”—(Now see the notions of this great and

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experienced Judge, with respect to entailed property, the absolute dominion over which is supposed to belong to those in possession of it)—“but to go that length in cases of entailed property, would in almost every such instance be over-reaching the life of the succeeding heir, which does not seem very consonant to the rational object and proper meaning of an entail;”—and then he proceeds upon the act of 1449, saying, (and this is matter of authority), “see the 19th of February 1771, reported in the late volume of the Faculty Decisions, where there is a good deal of discussion upon the subject*. The case of *Jordanhill*† is too shortly stated by Lord Elchies. The weight of his authority is great. He lays it down as the opinion of all the Judges in his time, that a lease must not exceed ordinary duration, to be protected against singular successors by the act 1449; but he still leaves it unexplained what *is ordinary duration*.”

In another part he states, that he can find no resting-place until he comes to thirty-one years, or two lives in being at the time of making the lease; and that none of the old lawyers framed out a tack of thirty-two years, because there it seems you get beyond the power of an heir of entail.

He then proceeds to the consideration of the grassums. His authority is undoubtedly of great importance in this matter; and it is quite decisive as to his opinion. He says, “As to the question now raised about grassums, it is entirely new to me.”

Opinion of Sir
Ilay Campbell,
as to grassum.

* Dict. of Dec. 15200.

† Decisions, tit. Tack, No. 18.

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Where there is
no authority
under the en-
tail, the heir
cannot lower
the rents, ex-
cept in case
of necessity.
Semb.

“ I had always considered it as indisputable, that so long as a tack was a tack,” (and whether a 999 years tack is a tack, is a question which must be decided in the cause of *Elgin v. Wellwood*; but you see that this learned person has thought it might be a question, whether a tack was a tack), “ the proprietor, whether entailed or not entailed, might let his farm as he pleased, and under any conditions he chose to annex, taking care always not to lower the current rent, to the prejudice of the heir of entail.” I remark again upon this passage as I pass along, that in the course of the former argument at your bar, neither authority, text-writer, case, nor dictum was heard, to assert that the heir of entail could let down the rent. I speak of cases where there is not authority under the entail to do it. It seems now, that is become matter of question. It is grave matter of question, for as there are a great many entails, I apprehend, (I think it right to use a word which shows that I do not mean to assert it, but only to state my apprehension,) in which *long* leasing would be held to be prohibited by the word “ alienation,” if under such a word short leases, which would not be alienations under the distinction which has been pointed out, may be made for any rent just higher than that which might be considered as an illusory rent, what would be the condition of persons having estates tail. It becomes material therefore to consider whether this can or cannot be done; for whether you call it implied prohibition, or whether you call it want of power, or whatever you call it, the incapacity to do it must be founded in some principle connected with the administration of the estate, if

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an heir of entail has not this power, except in cases where it is necessary. No person entertains a doubt, that if an heir of entail could show, that when he let down the rent he did it of *necessity*, that would not be a case in which it would be said to be wrongly done ; but supposing he cannot let down the rent in a case in which it is not necessary he should let down the rent, then the next question is, What is the principle upon which he is prohibited from letting down the rent? It must result from this principle, that those who are to enjoy the estate which he is bound to take care of, shall not enjoy it in a state less beneficial than they would if the rent was not let down ; and that proves the principle, that the heir of entail is bound at least to pay some attention to what is called the *rational* and *due administration* of the estate.

If the heir of entail granting a short lease cannot lower the rent to one degree above an illusory rent, that is on the principle that he must administer the estate fairly.

The paper then proceeds to state another principle, which likewise deserves attention on account of the authority from which it proceeds : “ By the current rent I mean that which has hitherto been obtained, not a future possible rent which might be got by varying the stipulations, and rejecting all entry-money, or other advantage to the heir in possession. The maker of an entail might no doubt prohibit grassums ;” (and there are unquestionably several entails in which grassums are prohibited ; I take those to be of very modern date, when compared with the entails under our consideration, and stated in the cases before the House) ; “ but even this would not always benefit the future heirs ; for still the heir in possession might decline to raise the rent, and it would be extremely difficult to

Opinion of Sir I. Campbell as to current rent and grassum.

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“force him, or even to prove the fact of grassum after his death.” Then he takes notice of the decisions which have been made in the Court of Session upon the subject of grassums, and says “he is at a loss to see the ground of a question; for if the tack be too long it will cease to be a tack, and even without a grassum, it could not be sustained; if within the bounds of a tack, it must be sustained whether grassum or not.”

He afterwards states, that this is the result of his experience upon the subject: “The question, What is a long lease participating of the character of alienation, and what is moderate, amounting to *administration* only, is no doubt attended with difficulty, because the limits have never yet been precisely drawn; but the question of grassum is of a very different nature, and it is astonishing to me how it should ever have been made a question at all. I have been now upwards of sixty years employed in studying, reading, practising, hearing and determining upon all sorts of questions in the laws of Scotland, and I declare I never heard from the mouth of any lawyer, old or young, or any Judge, nor ever read in any book, nor figured in my own mind till now, that an heir possessed of an entailed property, was or could be under the smallest restraint as to taking grassums upon the renewal of his leases, the entail itself saying nothing to the contrary, and the former current rent under a lease, which perhaps had been granted by the tailzier himself, *not being diminished* ;” (so that his opinion certainly is, that where there was nothing said about it, the rent could not be

diminished.) “ Tailzies very often say the rent
 “ shall not be diminished ; and this is clearly proper,
 “ because otherwise it might be unfairly done, and
 “ the tailzie rendered illusory. One instance oc-
 “ curred where an entail prohibited raising the rent,
 “ 5th February 1794, *Moir* *. This was a mere
 “ whim, and laughed at by the Court, and it was
 “ got quit of upon a specialty.” Then “ the utmost
 “ length that any tailzie case has yet gone, is to
 “ prohibit taking grassums ; and even this has not
 “ been done in many instances, and the effect of it
 “ is merely to serve as an inducement to let the
 “ farms, not by public auction to the highest offerer,
 “ but in a rational way, and for such an advance of
 “ rent as may with ease be obtained by a prudent
 “ landlord acting discreetly in his own affairs. In
 “ this way alone it is practicable, without involving
 “ the management of an estate in the greatest pos-
 “ sible confusion.”

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This difficulty has been raised very high in argu-
 ment. It has been said, no heir of tailzie can know,
 and no other person can know, when he lets for the
 best and most improved rent. That the difficulty of
knowing that, is such that you cannot adopt it as a
 principle. An English lawyer may think there is no
 great difficulty in matters, in which those who are
 experienced in the Scots law think there can be
 nothing but difficulty. There is not a single mar-
 riage-settlement in England, that has been drawn
 for some centuries, where the tenant for life has not
 a power of leasing, and that power is given to him
 to lease for the best and most improved rent, and
 the lease is void if not so made ; and yet I believe I

Power of leas-
 ing in English
 marriage set-
 tlements at
 best and most
 improved
 rents.

* Dict. of Dec. 15537.

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Donee of power taking same rent for himself as for those in remainder, there is a presumption that it is the best; the burden of proof that it is not so, is thrown upon those who impeach the lease.

If due administration is the principle of decision, it must be applied notwithstanding the difficulty of the rule.

may challenge the experience of the oldest persons in Westminster Hall, to point out three or four instances of leases being held void upon that restriction. Our Courts have said, the best evidence that a man has let for the best and most improved rent is, that he has taken no more himself than he has taken care those who come after him shall have. We may trust to the inclination of mankind in general, to get as much as they can get, and if the tenant for life provides for those who are to take after him, as he has provided for himself, (to be sure he may be under mistake as to them and as to himself, and he may take too little, but it is not very likely he should expose himself to that mistake, or willingly take too little,) this throws a burthen on those who mean to quarrel with such a lease, to prove that there was in the transaction that want of ordinary prudence which shows an inattention to the prescribed terms under which he was to let the lease. *Primâ facie* a lease has been always held to be good against remainder-men, which made for them the same provision as for the tenant for life; and I believe, in ninety-nine cases in a hundred, that is the safe principle of decision. If the principle of leasing, either under powers of leasing in English deeds, or under the declared right of leasing in Scotch tailzies, does in law depend upon the lease being made with a due and rational attention to the administration of the estate, whatever difficulties there may be in applying that principle, you must come to the question, whether the lease, or whatever it is, is made upon the principle on which the law of Scotland will decide for its validity?

I will go no farther in the statement of this paper

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there appears in it to be great authority in favour of grassum ; and it helps to show what is the opinion of the Judges and lawyers of Scotland upon alienation, as being or not being the result of tacks of longer or shorter duration ; and, as far as it goes, to show the principle upon which a prohibition of alienation has been held to prohibit tacks of a long duration, but not of a short duration.

The act of the 10th of Geo. III. is intituled, “ An ^{10 Geo. 3.} act to encourage the improvement of lands, tene- Title.
ments and hereditaments, in that part of Great
Britain called Scotland, held under settlements of
strict entail.”

The recital is in these words : “ Whereas, by Recital.
an act of Parliament of Scotland, made in the
year 1685, intituled, ‘ An act concerning taillies,’
all his Majesty’s subjects are empowered to taillie
their lands and estates in Scotland, with such
provisions and conditions as they shall think fit,
and with such irritant and resolute clauses
as to them shall seem proper ; and which taillies,
when completed and published in the manner
directed by the said act, are declared to be real
and effectual against purchasers, creditors and
others whatsoever ; and whereas many taillies of
lands and estates in Scotland, made as well before
as after passing the said act, do contain clauses,
limiting the heirs of entail from granting tacks or
leases of a longer endurance than their own lives,
for a small number of years only,” (the printing
is, *or* for a small number of years only, and the
policy of the act is to encourage the improvement
of lands, &c.) “ whereby the cultivation of land in

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10 Geo. 3,
enactment.

“ that part of this kingdom is greatly obstructed,
“ and much mischief arises to the public.”

Upon this recital the act incapacitating those whom it prohibits by general words, or if not by general words, by the fact that they were either permitted to make particular leases, or prohibited from making other leases, goes on to provide, “ that it shall and “ may be lawful to every proprietor of an entailed “ estate, within that part of Great Britain called “ Scotland, to grant *tacks* or leases of all, or any “ part or parts thereof, for any number of years, “ not exceeding fourteen years, from the term of “ Whitsunday next after the date thereof, and for “ the life of one person, to be named in such tacks “ or leases, and in being at the time of making “ thereof, or for the lives of two persons to be named “ therein, and in being at the time of making the “ same, and the life of the survivor of them, or for “ any number of years not exceeding thirty-one “ years from the term aforesaid.”

Here the Legislature seems to consider a lease for fourteen years, and the life of one person, or a lease not for any certain number of years, but for the lives of two persons, or a lease not for any life or lives, but for thirty-one years, as being in some respect equivalent to each other in the ordinary and proper management of a Scotch estate. Then if they are made for two lives, there is to be a special clause about inclosing, &c. and if for nineteen years, the lessees are to fence and inclose the lands ; and every lease of above nineteen years is to contain certain clauses for the proper administration of the estate, which it is not necessary for me here to mention : “ And

“ all leases made or to be granted under the authority of this act, shall be made or granted for a rent *not under the rent payable by the last lease or sett, and without grassum, fine or foregift*, or any benefit whatsoever, directly or indirectly received or accruing to the grantor, except the rent payable by the lease ; and that no such lease shall be granted till after the end or other determination of any former lease of the same premises, or that such lease, if granted for a time certain, shall be within one year of being determined, and that all leases otherwise granted, shall be void and null.”

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conditions of
lease.

Here it must be admitted, that the Legislature had in contemplation the practice of letting, under the rent last received; that they had in contemplation a species of letting with grassum, fine or foregift ; that they had in contemplation that species of tack which occurs in this case, a letting in fact before the determination of a former lease; and that they likewise had in contemplation, that if a man let a lease under this act before the former lease was expired, and more than one year before the expiration of that former lease, it was an addition to that former lease, which under the authority of this act would be void.

Then follows this clause, which I apprehend must be supposed to take out of the authority of this act of Parliament the cases referred to in this clause: “ That if any taillie shall, either expressly or by implication, contain powers of leasing more ample than are hereby given, the heirs of entail in possession shall be at liberty to exercise all such powers in the same manner as if this act had never been made.”

This clause, in judicial construction, can mean no

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more than this, as it seems to me, namely, that persons who had larger powers of leasing than are here given, shall not be prejudiced by the enactment of this act.

Proviso as to
improvements.

The decision
that three
fourths of ex-
penditure for
improvements
to be paid by
the succeeding
heir out of the
rent reserved,
over and above
grassum,
questioned.

The act then proceeds to that part of it which relates to the encouragement to lay out money. In one of the *cases of Elliotts**, where a tenant of entail had laid out money on improvements, and where by letting leases he had by grassum got into his pocket that sum of money which he had expended in improvements, and afterwards his estate tailzie ceased, and another person under the effect of the entail came to the enjoyment of the estate; the Court of Session held, that under the true construction of the clause which followed, though that person had received in the shape of grassum so much for the improvements which he had made upon the estate, yet that he had a title under this act, as against the person who succeeded him, for three-fourths of those improvements, to be paid out of the rent reserved to the persons who were to succeed. Taking it for the present to be a right decision, consider what the effect of this act of Parliament is, if grassums are to be taken. The result would be, if a tenant under the tailzie should lay out a large sum of money in improvements, (not exceeding such a sum, the act puts a limit to the amount of the improvements, but supposing that sum of money to be considerable, as in many estates it will be), if he afterwards lets the estate, getting a considerable sum as a grassum, in a case where he cannot let with a diminution of the rent, that a person succeeding to the estate is to pay such proportion

* Trustees of Sir F. Elliott v. Sir W. Elliott, 1793, Jan. 22. Dict. of Dec. 15622.

of those improvements out of the small rent reserved by a man who takes a large grassum. It is difficult to say that such can be the right construction of this act of Parliament.

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With respect to the lease of Harestanes, which is for fifty-seven years, the question is, whether it can be supported, considering the principles on which this House has held a ninety-seven years lease bad, or upon the principle upon which, as it appears to me, they have always acted; (I mean in judgment—practice is a different matter)—can such a lease be sustained upon the principle of distinction between long leases and short leases? The Court of Session is of opinion that it is a term which amounts to an alienation, and cannot be supported. If your Lordships are of that opinion, which I humbly state to be mine, that would dispose of the lease of Easter Harestanes. By the list of leases which has been laid upon your table, with a view to show what grassums have been taken upon the Queensberry estate, it appears that it was at a very late period indeed before any body dealing with that estate got, even in a very few solitary instances, to a lease of nineteen years. They were of very short duration; and so were almost all the leases contained in the list laid before your Lordships with respect to grassums, leases of very short duration. They show, that the persons dealing with that estate thought they were justified in taking grassums, but not for leases of sixty, seventy, ninety, or a hundred years; and although there are to be found in Scotland very long leases, I find that with very few exceptions in judgment, such leases have not been sustained.

Harestanes,
whether 57
years a good
lease.Held void as
an alienation.

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Whether 57, 30, 27 years, or what number of years, is too long for a lease, is to be decided on the principles of fair administration.

The uncertainty shows the necessity of legislative interference.

It has been asked, if you do not sustain a lease for fifty-seven years, will you sustain a lease for fifty years? will you sustain a lease for thirty years? will you sustain a lease for twenty-seven years? Or, to put the question as the case upon your table requires us, as to what we call the alternative leases, what will you sustain, if you do not sustain fifty-seven? Sir Ilay Campbell answers that question; but if I am to answer, I resort to the principle which cuts down one of those leases, because it is inconsistent with the fair and rational administration of the estate. I should be disposed to say, that with reference to ninety years, or such leases as are mentioned in the act of Parliament, it would be a lease of too long duration. If you ask me, why I say so, I can give you no more satisfactory answer, than that I think it is a rational application of the principle upon which they have held leases too long not to be good. But I do not know, with respect to this, and every other part of the case, any thing which appears to me to deserve so much and so strong recommendation to have these matters all settled by Parliament, as the state in which the power of leasing in Scotland exists.

In respect of other leases, it becomes extremely important that some such measure should be adopted: it would leave the law of Scotland in a cruel state, if on the one hand grassums cannot be taken in which the families of heirs of entail may be interested; I mean their widows and their children; for it is impossible, looking into the matter historically, to deny that this method of taking grassums has been frequently resorted to, to enable the heirs of

entail to make provision for wives and younger children, for whom, as in the Buccleuch cases, it would be found extremely difficult, on the construction that shuts out grassum, to make provision. On the other hand, it appears to me equally clear, that if grassums can be taken in the way in which they have been taken, the result may be, (and more especially where there is no prohibition that requires keeping up the old rent, and any rent may therefore be taken,) the consequence must be, unless there be some reasonable provision made about grassums, that the heirs of entail may be disappointed of their whole provision, supposing every one can so act with respect to his own posterity under a charter made by his ancestors for his and for their provision. Whether that is a desirable consequence—whether entails ought to be thus defeated—is a distinct question.

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LEASES.Opposite in-
conveniences
of prohibiting
and permitting
the taking of
grassums.

The power of judges, in this respect, may be doubted. Upon that subject, as it applies to English law, I have formed an opinion, which leads me to think, that the judges of this age, in England, would not have been permitted to get rid of the statute of English entails, as judges of that age did soon after the passing of the statute *de donis*.

Power of
Judges to
affect statu-
tory entails,
on grounds of
policy, ques-
tioned.

The next subject is the alternative leases. The Division of the Court of Session, which has decided upon the alternative leases, seems to have been of opinion, that those leases, in the first instance, might be good for twenty-one years, or that they might be good for nineteen years; or in the first instance, for nineteen, and then for twenty-one years, (I do not recollect which) were it not that they were

Alternative
leases void for
uncertainty.

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Action of declarator as to right, a useful proceeding in Courts of Scotland.

affected by fraud. I cannot bring myself to think that such alternative leases can be good. The action of declarator has been stated in the papers before us, and most justly and truly stated, to be an extremely useful proceeding in the Court of Scotland. It enables a person to have it declared, whether there is or is not such a lease, as he contends there is, and as other persons contend there is not. Upon such a proceeding, it seems to have been thought, if the late Duke of Queensberry grants a lease for thirty-one years ; if that will not do, for twenty-nine years ; if that will not do, for twenty-seven years ; if that will not do, for twenty-five years ; if that will not do, for twenty-three years ; if that will not do, for twenty-one years ; and if that will not do, for nineteen years, agreeing also, that if the House of Lords shall decide in the Wakefield case, or in any other case, that a ninety-seven years lease is good, they shall not have a lease for nineteen, or thirty-one, or any other fixed period of duration, but for ninety-seven, or for fifty-seven, or the longest which the Court of Session or the House of Lords may approve, that such a lease could be good, if it was not affected by a general fraud—a general device, founded in fraud, which that Division of the Court of Session imputes to all those cases. Now, putting that general fraud out of the question, it appears to me to be a most extraordinary thing, that a lease of such a nature as this, with such an indefinite ish, as a contract of this kind provides for, can be a good lease. If it can be a good lease, I have no conception how persons are to deal with each other, in respect of a lease of this sort, supposing no other person in-

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under a power
void for the
excess only.

terested but the landlord and his tenant ; for the rent of the lease frequently varies, according to the extent of the term which the party grants ; the rent is set with express reference to the term. We have a rule in Westminster Hall *, that if a man has a power to grant for ten years, and he grants for twenty-one, the lease, although bad for the twenty-one, will be good for the ten ; because, there both parties have before them a written instrument, which gives the power ; and they both know what is the utmost extent for which it can be good. But how are we to deal with a contract of this sort, made liable to such alterations, where the contract itself is founded upon the necessity of limitation ?—What is to be the state of law and property in Scotland, if the contract itself does not furnish the means to determine what lease is either to bind the lessor, or those to come after him, as personal representatives, or as real representatives, or the heirs of tailzie, in the case of a lease rental ?—if no person is to know what burden there is upon that estate, in the shape of a tack, or rental, until the question has been pursued, (as this lease provides it shall be,) through the Court of Session and the House of Lords. According to English law, there may be a good lease for ten years, if *A. B.* shall not come from Rome in ten years, or for twenty years if *A. B.* shall not come from Rome in twenty years ; but then there is a certain

Leases for a
certain dura-
tion subject to
be defeated
upon a con-
tingency.

* In the Courts of Equity. *Campbell v. Leach*, Ambler, 740 ; *Shannon v. Bradstreet*, 1 Schoales & Lef. 52. Excessive leases are held void at law. *Hardres*, 398.—As to the authority of *Leach v. Campbell*, see the observations of the Lord Chancellor in his judgment upon the case *Ex parte Smith*, 1 Swanst. 336.

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grassum.

Conclusions
and reasons of
the first and
second divi-
sion of the
Court of
Session.

must be at an end, on that certain fact taking place ; but I cannot find out the principle of law upon which such leases can be held to be good.

Supposing these leases to be good in other respects, the next, and the most important question is, whether the taking a grassum is that which leads to the conclusions, which are to be found embodied in the interlocutors of the First Division of the Court of Session, with respect to the March and Neidpath estates ; or to those which are to be found embodied in the interlocutors of the Court of the Second Division, with respect to the Buccleuch estate. What the principle is, upon which the First Division of the Court proceed, we know ; for they, in their interlocutors, state expressly the grounds and principles upon which they proceed. What was the principle upon which the Court of the Second Division proceeded, is to be collected, as well as we can collect it, not from the terms of the interlocutor, but from such conclusion as may be found to arise out of the opinions delivered upon the subject. That interlocutor does not enter into a detail of the grounds of the opinion, in the same way as the interlocutor does with respect to the March and Neidpath estates.

Different ex-
pressions in
the different
deeds of
entail.

The Buccleuch
entail wanting
the word
“ alienate,”
whether lease
with grassum
prohibited.

Supposing the doctrine to be against grassum, you cannot apply that doctrine to the Buccleuch property, unless leases with grassum are prohibited in the true construction of that deed of entail, although the word “ alienate ” is not in the deed. If you are of opinion, that the operation of that deed of entail would be the same without that word as with it, then the question as to grassum arises with

respect to the leases made under those deeds respectively. The question must be considered, having regard to the different expressions, and the import of the different expressions which are to be found in those deeds, and as far, and no farther, than legal implication in construction will authorize you to attend to the several provisions, as manifesting the general meaning of the authors of these deeds of entail.

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Question as affected by expressions and provisions manifesting the intent of the authors of the entail.

The Neidpath entail provides, “that it shall be
 “noways lawful to the heirs of taillie, nor any of
 “them, *to sell, alienate, wadset, or dispo*ne any of
 “the said haill lands,” and so on, “or any part there-
 “of, nor to grant infeftments of liferents, nor an-
 “nualrents furth of the same, nor to contract debts,
 “nor do any other fact or deed whatsoever, whereby
 “the said lands and estate, or any part thereof, may
 “be adjudged, apprised, or otherways evicted from
 “them, or any of them, nor by any other manner of
 “way whatsoever, to alter or infringe the order and
 “course of succession above-mentioned.” And after
 the irritant and resolute clauses, by a subsequent
 clause “it is provided, that notwithstanding of the
 “irritant and resolute clauses above-mentioned, it
 “shall be lawful and competent to the heirs of taillie
 “a-specified, and their foresaids, after the decease of
 “the said William Duke of Queensberry, to set tacks
 “of the said lands and estates during their own
 “lifetimes, or the lifetimes of the receivers thereof;
 “the same being always set without *evident dimi-*
 “*nution of the rental.*” There is then a power of
 providing for their wives, and for their younger
 children.

Provisions of Neidpath entail.

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Queensberry
entail.

Meaning of
word "dis-
pone" ascer-
tained by the
context.

In the other entail, after stating what it shall be lawful for the entailer himself to do, it proceeds to state, "That it shall not be lawful to the said Lord Charles Douglas, and the heirs-male of his body, nor to the other heirs of tailzie above mentioned, nor any of them, to sell, wadset or *dispone* any of the foresaid earldom, lands," and so on, "nor any part of the same, nor to grant infeftments of liferent or annualrent out of the same, nor to contract debts, nor do any other fact or deed whereby the same, or any part thereof, may be adjudged, apprised, or anyways evicted from them, or any of them, except so far as they are empowered in manner after mentioned, nor to violate or alter the order of succession foresaid, any manner of way whatsoever." These words, "any manner of way whatsoever," appear to me to have relation to every thing tha tis before prohibited; and when in an antecedent part of this entail, it is stated, that the author of this tailzie may *dispone* in any manner of way whatsoever, and the others are here prohibited to *dispone* in any manner of way whatsoever, it appears difficult to say, under such expression, that the word "*dispone*," meant only to prevent what is technically called disposition; and these words, "except so far as they are empowered in manner after mentioned," apply to a special prohibition, among other things, of granting leases, which special prohibition is in these words: "That the said Lord Charles Douglas, nor the other heirs of tailzie above specified, shall not set tacks nor rentals of the said lands for any longer spaces than the setter's lifetime, or for nineteen years, and that without

“diminution of the rental, at the least, at the just
 “avail for the time; nor to do any other fact or
 “deed, civil or criminal, directly or indirectly, by
 “treason or otherwise;” and so on.

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The provision to be made for spouses by this deed went to the extent of a thousand pounds for one—to a larger sum for two—and if three, it might amount to about two thousand three hundred pounds; and there was likewise a provision for daughters and younger children, amounting to the sum of fourscore thousand pounds Scots, which would be between six and seven thousand pounds sterling.

Such was the nature of the instruments; and the question arises, (regard being had to the provisions contained in them,) whether, according to the law of Scotland, grassums could or could not be taken upon such leases as the Duke of Queensberry has thought proper to grant?

With respect to the practice as to leases of private property in Scotland, the counsel for the respondents have laid before you a list of leases which have been made with grassums. Those leases, I think, with respect to their duration, you will find to be generally very short; some of them certainly of considerable length; and with respect to the periods at which those leases have been made not going so far back by any means as the year 1685, when the statute of tailzies was made.

Practice as to
 leases of private
 property.

Those who encounter the argument drawn from this practice, say, that the list is not confined to leases of entailed estates, but that, on the contrary, by far the greater part of the lands mentioned seem to be unentailed; and it may be worth attention to look into

Arguments as
 to the alleged
 practice.

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the list, with a view to see how far this observation is founded in fact. They say further, that a considerable number of the instances in the list are quoted without any statement except that the defenders are not informed concerning them. They further state, that in almost the whole, no more is taken by way of grassum than one year's value. In answer to which, this observation arises, and has been made, that the question, whether a grassum is to be taken or not, does not depend upon the quantity of the grassum—that if a large grassum is not lawful, a small grassum is not lawful; and that again is met with this observation, that the fact that no attempt has been made to set aside deeds which have been made partly in consideration of grassum, may be accounted for by the circumstance that the grassum was small.

Practice of
taking grassum
in the Queens-
berry estate
by tutors in
high judicial
situations.

With respect to the leases of the Queensberry estate, it certainly does appear that, although this estate was entailed in 1705, grassums were taken within a very few years of that date; and that the grassums continued to be taken upon it, (the leases being short, and the grassums in general not being large, except in some instances), down to much later times; and it is to be observed, that this practice with respect to the estate of Queensberry, carries with it the authority which belongs to the circumstance, that two of the tutors or curators, or whatever they may be, of the Duke of Queensberry for the time being, letting these leases with grassums, were persons in the highest situation of the law in Scotland.

To answer the observation that these practices

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passed without question, the appellants state, that it does not appear that the substitutes of entail, or any but the immediate successor, had an interest during the life of the actual tenant to question the lease, and that if questioned, the irritancy might be purged, with the consent of the tenant, so that the next heir would gain nothing during the life of the heir in possession. On the other hand, it is said, that if the taking grassums is unlawful, they may still be purged, notwithstanding the death of the Duke of Queensberry—a proposition which may call for your judgment. The appellants further represent circumstances which might induce the next heir not to question the lease—first, during the granter's life, it might be doubtful whether any declaratur of irritancy could be maintained, although grassum were taken, if the lease were short; for the tenant's life might endure beyond it, and that he might plead in defence; secondly, he might be a near relation of the tenant, and perhaps answerable in his own person to indemnify the person who might have suffered by the supposed violation of the entail; thirdly, he might have a wish to take grassums himself;—and when I come to state the facts, you will see that the weight which belongs to such a suggestion is, that his predecessor may have left his disposable property to near connections, and the succeeding heir of entail could not therefore prosecute the irritancy without affecting such relations, if he were not himself, out of assets descended to him, answerable to repair the loss suffered by the effect of the irritancy. This thing happens perhaps nineteen times out of twenty in such successions; and they point out in this list,

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to the practice
appearing by
the lists.

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instances in which it has happened, and in which they therefore insist, that the person who could have challenged on account of grassum, had been prudent in not challenging on account of grassum, for that he would only have taken the burden of the grassum off the entailed to the unentailed estate, which would have been liable to it. Upon the whole, they say, therefore, that the list is by no means a formidable list on the head of the practice.

Practice of
appellant and
his family.

To this I think must be added, that the persons who now complain, Lord Wemyss himself, or that family at least, granted leases with grassums. On the other hand, it must be admitted, that great part of the entailed estates in Scotland do not appear, by any evidence we have before us, to have been in the hands of persons who have let leases for grassums. This circumstance, however, again, is to be taken into consideration with regard to the defenders, that there may have been very great difficulty on the part of those who were to endeavour to find out what had been the practice as to those entailed estates. It is quite obvious, undoubtedly, that the very importance of this point would lead persons to take a great deal of care, how they afforded the means of information to those prosecuting this cause, as to the circumstances in which their own estate stood.

Difficulty of
access to cases
upon entailed
estates.

Practice as to
church and
crown lands.

On the head of practice, the respondents again refer to the practice with respect to Crown lands, and the practice with respect to Church lands. It is not my intention to go through all the reasoning upon that subject. I think it may be stated as to Crown lands, and also as to Church lands, in

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in that period the statutes* had not pointed out that the possessor was to reserve the rent subsisting at the time of his entry—if he did reserve that rent, he was not prohibited; unless you can argue from the case about teinds, as the Court of Session has done †; and with respect to Crown and Church lands, there has been a degree of irregularity in the management of them, which does not make the practice with respect to them of much importance. It is a consideration of some importance, however, because, particularly with respect to the Church lands, a practice did obtain in Scotland of taking grassums, which now obtains in England, and I believe in Wales, under the name of fines, not very much to the benefit, or with the approbation of those who have the good or bad luck to succeed receivers of those grassums or fines.

Irregularity in
practice as to
church lands.

They have also stated many decisions of the Court of Session in Scotland, in which they represent that the right to take grassums has been established, and they cite a great many instances in which, as far as they go, there has been a general impression in the Courts of Scotland, in favour of the practice, as far as it is established by what the Judges have said, and what they have done, and what they have forbore to do or to say. In the case of *Sir Archibald Denham v. William Wilson*, † writer in Edinburgh as that case is stated in the papers on your table, and taken, as I understand, from the papers in the cause, “ Sir William Denham of Westshiell, of the

Decisions in
favour of
grassum.Case of Den-
ham v. Wilson,
15 Jan. 1761.

* As to the beneficed clergy under prelaties, by the Scots Stat. 1581, No. 101; and as to all ecclesiastical persons, including by name bishops, abbots and priors, by the Scots Stat. 1585, No. 11.

† See *ante*, p. 393-4. † Dict. of Decis.

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“ date of August 11th 1711, executed a deed of
“ entail of his lands of Westshiell, and burthened
“ the same with an annuity of 4,000*l.* to Dame
“ Katherine Erskine, spouse, afterwards Lady
“ Schawfield. The pursuer, upon the decease of the
“ late Sir Robert Denham, succeeded as heir of en-
“ tail to the said estate, and soon found it absolutely
“ necessary to bring a process against the defender,
“ who for some time had been Sir Robert’s factor upon
“ that estate,”—(your Lordships will observe that),
“ —and likewise his agent and trustee, and had ob-
“ tained an assignation to the rents that fell due
“ during Sir Robert’s life, to whom he had also
“ confirmed himself executor-creditor.—The pur-
“ suer was advised, that it was the duty of the Heirs
“ of entail, out of the proceeds of the estate, to pay
“ the lady’s annuity, and keep down the annual-
“ rents of the heritable debts of the tailzier with
“ which the estate was chargeable.”

Implied pro-
hibition on
succeeding
heir to keep
down the an-
nuities charged
on the estate
out of the
proceeds,
although
there is no
clause in the
entail direct-
ing such pay-
ment. This is
required on the
principle that
the interest of
successors is
to be regarded.

Whether you are to call it an implied prohibition, or whatever else you may call it, it appears to me to be admitted in the papers before us, that the succeeding heir of tailzie was to keep down annuities out of the proceeds of the estate, and that he was likewise to keep down the annual rents of the heritable debts of the tailzier, with which the estate was chargeable, although in the tailzie there was no clause which ordered him to do so; and those duties of keeping down the annuity and the annual-rents by the persons representing the estate, are duties which one may venture to represent, as founded in an obligation which has some relation to the interest of those to come after him.

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The case continues thus : “ It seems that Sir Robert’s plan was to render the estate of as little value as possible to the next heir; for when the defender was factor, whatever payments of these burdens was made out of the rents of the estate, he, instead of taking discharges, took assignations in his own name; so that, had Sir Robert lived any number of years longer, by this scheme, the succeeding heirs of entail would have been quite cut off, and the tailzier’s intention totally defeated.”

But the matter did not rest here; Sir Robert Denham also fell upon a new, and what, with submission, appears a most unwarrantable device, to disappoint the heir of entail of a considerable part of the proceeds of the estate for many years after his decease, by letting leases for which he not only took considerable grassums,—(your Lordships will be pleased now to advert to the specialty of this case,)—but also took bonds or bills from the tenants for part of their rents, payable by partial payments annually, for the same endurance with the tacks; to which bonds and bills it seems the defender had got assignation, and intimated the same some time after Sir Robert’s decease.

When the process against the defender came before the Lord Bankton Ordinary, the pursuer insisted that the annual sums payable on these bonds and bills were part of the future rents of the estate of Westshiell, to which the pursuer, as heir of entail, had right, and therefore that his Lordship should, *ante omnia*, decern the defender to repay what he had uplifted since Sir Robert’s death, by virtue of his assignation to these bonds and bills, and transfer

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Argued that
these bonds,
&c. not grass-
sums.

the same to the pursuer in so far as not uplifted. His Lordship, of the date of July 14th 1758, was pleased to make *avisandum* to the Lords with the above point, and to order informations to be given in for both parties; and then on the part of the pursuer, “ *Primo*, It is contended, that these bonds “ and bills assigned by Sir Robert to the defender, “ could by no means be effectually conveyed to him “ for a longer endurance than Sir Robert’s life; it “ might as well be pleaded, that Sir Robert could “ assign the whole rents of the estate for nineteen “ years, the term of the endurance of the tacks, as “ that part of the rents which is constitute by bonds “ and bills, than which nothing could be more absurd. “ *Secundo*, That there was no room to allege that the “ sums contained in these bonds or bills ought to be “ considered as grassums, which heirs of entail are “ frequently in use to take without challenge,— “ seeing at letting the present tacks considerable “ grassums were paid to Sir Robert, quite distinct “ from these obligations, to the extent of about 300*l.* “ sterling, and the amount of the sums in these same “ bonds and bills comes to no less than 637*l.* 1*s.* 4*d.* “ Scots per annum of rent, which at the expiry of the “ tack makes a total of 11,524*l.* 8*s.* Scots, which “ by this device the heir of entail would be dis- “ appointed of, should this new invented plan meet “ with success.” Then they state, “ that this is a “ most illegal machination; for at that rate, sup- “ posing an entailed estate should improve from “ 500*l.* to 1,000*l.* sterling per annum, nineteen “ years rent of 500*l.* a year might be conveyed to “ a stranger, in direct violation of the intention of

“ the maker of the entail; a scheme which, at first sight, appears fraudulent, and inconsistent with the law, so long as entails are permitted to take place in this country.” Then they insisted, that these were to be considered as annualrents in the nature of discharges; and they proceeded to state upon the whole, and under the circumstances of the case, that whatever might be said about that which was paid at the commencement of the lease as grassum, it was, as with respect to these bonds and bills, to be considered as rent

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Wilson.

On the other hand, it was insisted, that there was not the least pretence for this,—both sides agreed that grassum might be taken,—there was no point, therefore, brought before the Court as to that, but it must be admitted, that both sides agreed that grassum might be taken; and your Lordships will hear what the Judges said on that point; but Mr. Wilson said this in effect—This is a very strange claim you make,—for the result of it is neither more nor less than this—here are (I forget what number, but I think twenty-one) tenants, who upon the renewal of their leases, a dozen of them being in good circumstances, say, here is a grassum,—(this was an entail, where it was to be without a diminution of rental,)—here is a grassum, let us have our lease at the rent last paid;—the heir in possession takes the grassum from them.—With respect to other persons, not in quite so good circumstances as the former, they say we cannot pay down the grassum, but our grassum shall be so much, and we will pay you that, *de anno in annum*, till we have satisfied you the whole of it. The grassum, if it be legal, must be paid, it is said, at the commence-

In the West-shiells case, agreed that grassum might be taken.

Grassum de anno in annum upon credit by different payments in successive years.

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ment of the lease ; but, argues Mr. Wilson, if it can be taken at the commencement of the lease, how can it be illegal for the parties to agree that the landlord shall give credit to the tenant for the grassum, till such time as it shall be convenient for the tenant to pay it ; or that, instead of receiving that grassum in one payment, he will take it in different payments, in succeeding years ; supposing, for instance, a person who could not part with his money, had been able to find some person to make up the money, and that other person had paid the money, and that the landlord had then given him back his bond to pay the grassum at a particular period, or at particular periods. This, it was contended, was in substance and effect precisely the same thing.

Opinions of
Judges.

The Judges, as far as we have notes of their judgment, express themselves in the following terms :— My Lord Kames says, “ A bond payable for sums “ at the terms the rent is paid, is presumed a part of “ the rent.” Here it must be remarked, that the sums were not payable at the time the rent was paid ; that is a mistake. “ But in this case, we should not go upon “ presumptions ; a proof ought to be allowed, that “ these bonds were granted for rents—these bonds “ must be paid to Sir Archibald.”

Lord Coalston says, “ There is no fraud in this “ case—a lawful act to take bonds for grassums, “ as the heir of entail is not restricted in setting “ tacks :” so that he considers all this as grassum. The bonds were taken for what he thought a grassum, just as much as any payments could in the consideration of the Judges be considered as having the character of grassum.

Lord Minto says, "The question depends upon ^{1819.}
 "this fact, Whether this is a grassum or a rent."
 Mr. Justice-Clerk says nothing.

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Then follows Lord Alemore, and what he states, will be well worthy your Lordships attention :—"A
 "deception of this kind is not unlawful, but if not
 "cleverly done, it cannot be sustained. Every
 "bungling operator is not fit to execute such nice
 "operations. This deception is not properly ex-
 "cused—this appears to be rent, not a grassum."

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Lord Nisbet says, "This a grassum, not a rent,
 "it has not the qualities of rents—no hypothec."

Lord Auchinleck says, "These bonds rent, not
 "grassums."

Lockhart, the defender's counsel, observed, that the heir of entail could have discharged these bonds ; he could not discharge rents.

Upon the report of the Lord Ordinary, "The
 "Lords sustain the defences of William Wilson,
 "defender, against that part of the pursuer's libel
 "which concerns the bonds and bills granted by the
 "tenants of Westshiell to the deceased Sir Robert
 "Denham, to which the said defender has right,
 "partly by assignation, and partly as executor decern-
 "ed and confirmed to the said Sir Robert Denham,
 "and remit to the Lord Ordinary in the cause to
 "proceed accordingly."

So that, in the first instance, the parties and the Court proceed upon the notion of grassum not being subject to objection. There was a very good reason for that : the Judges, one and all, were taking grassums themselves : even my Lord Alemore, who thinks the deception was not unlawful, so that it was cleverly

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done ; but that here the operator was a bungler, and the payment therefore appeared to be rent, instead of grassum. Upon the whole, however, they were of opinion it was to be considered as a grassum, and they sustained the defences, as far as concerned the bonds and bills.

This was brought before the Court again ; and it was argued, that this was an attempt to evade ; that it signified nothing, whether the bonds and bills could be sustained or not ; that it must be considered as a rent ; and the Judges were finally of opinion, and came to this decision in substance— That if you contract for grassum at the commencement, you may take it, and keep it ; and that the lease is a good lease, provided it be made without a diminution of the rental ; but that, on the other hand, if you deal with a tenant, who cannot immediately pay you a grassum, and you agree with that tenant to take annually from him sums, which are in discharge of the grassum ; in fact, those annual sums are not to be considered as grassums, but to be considered as rent ; in other words, that the grassum must be presently paid, and you cannot give time, in the manner in which it is here stated, to pay the grassum *de anno in annum*. I understand that this case did not come before the House of Lords ; but it is a case which deserves a great deal of consideration. It seems to decide, that if a sum of money, before or at the time of granting the lease, is taken as grassum, the heir of tailzie has no right to complain ; but, if you can see from the whole transaction that the sum taken was reserved as rent, although expressly in discharge or satisfaction of grassum, then it must be taken as rent. But why, because to be paid in

Final judgment that grassum taken at the beginning of the lease is lawful, but if taken in sums annually paid in discharge of grassum, it is rent.

Denham v. Wilson an authority requiring consideration.

— If present payments are allowable as grassum, it is difficult to deduce from principle, how future payments in respect of grassum can be forbidden as rent.

future, it was to be taken as rent, appears to me a proposition extremely difficult to be deduced from the principles which must be supposed to have governed this case*.

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There are several other questions, which we shall be obliged, I think, to put to ourselves, before we come to a determination of this case ; and they may be put some of them in this way. It is said, that by the law of Scotland the heir of tailzie cannot make a lease, which is to reserve to himself, during the first five years of lease, 800 *l.* a year, and then to reserve, during the remainder of the lease, 500 *l.* a year ; that the lease must not be more beneficial to the person holding at the commencement of the lease, than to those who are to take after him.

Law of Scotland that heir of tailzie in possession cannot grant a tack reserving more rent to himself than to his successors ;

Now, if that can be sustained as law, which is hardly denied, then this question presents itself : If a man cannot for the first five years of a nineteen years lease, take 1,000 *l.* or 1,500 *l.* a year for himself, reserving to himself, and those who come after him, 250 *l.* a year, for the remaining fourteen years of the lease—I may be wrong, but there does not appear to be a great deal of good sense in saying, he may do that *per indirectum*, which he cannot do *per directum* ; that is to say, that instead of reserving the 1,000 *l.* a year, or 1,500 *l.* a year, for the first five years, he may reserve throughout the whole of the lease only 500 *l.* or 250 *l.* a year ; and, instead of the 1,500 *l.* a year, or the additional rent for the first five years, he may take *in præsenti* from his lessee as much as that 1,500 *l.* a year, or the additional rent for the first five years, would amount to.

but this is effected indirectly by taking grassum, which infringes the principle of the rule.

* *Vide post*, 465, the further discussion of this case.

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Suppose the words "without diminution of the rental," to mean that the last rent may be taken, what is to be done where the rent has varied? as where the rent has been lowered of necessity upon a former lease, and afterwards the land is to be let, when the former value is restored, what is the rent to be taken?

Elliott v. Curries. Doubt as to the principle of decision.

Supposing the meaning of the words, "without diminution of rental," to be, that you might let at the last rent; I conceive it would be the same in point of law, even if we had no authorities so to inform us, that if there were no such words to be found in the Buccleuch entail, as "*the just avail at the time*," you might lower the rent, stating the reason. Then, suppose the rent having been lowered, there is a third lease to be granted; what is the rent at which that third lease is to be granted? Is it the rent which was the last rent which had been so lowered; or are you to refer back again to that which was the rent before it was so lowered? I find, there is one case*—(it was not a case where the last rent had been diminished on a subsequent lease, but) where the tenant who held, had ceased to hold, and the land was taken into the possession of the landlord himself, and he held it for a considerable time.—If the value of land, in the last year in which he so held it, had been asked, and it turned out that the value of the land to be let was 1,000 *l.* a year; and, on the other hand, that the actual rent reserved, before that landlord took it into his natural possession, was only 500 *l.* a year—I understand there is one case, in which it has been held, that if the landlord chooses to let it again, he is allowed to let it, not at such a rent as the value at the period of his natural possession would justify, but at the low rent which the land was let for at the time when his holding commenced. If you consider what may be the effect of such a rule, I think you will see no small reason to doubt the principle upon which it stands.

* Elliott v. Curries, Fac. Coll. Jan. 16, 1798.

*In this case, the great and important question is, 1819.
 What is the effect of that thing, which in this case is CASE OF THE QUEENSBERRY LEASES.
 called grassum, but which I apprehend must be called L. C.
 rent. With respect to the tacks made under this en- 10 July 1819.
 tail, sometimes inconsiderable sums were taken—one The rules of law, although originally in-
expedient, ought not to be varied.
 year's or two years rent, reserving sometimes the old
 rent, understanding the words, the old rent, to be rent
 recently paid before the lease is made. Upon this
 transaction, we are to decide what is the Scotch law
 applicable to the subject—we are to look at the
 practice—we are to look at the understanding of the
 Courts—we are to look at decision—and if an opinion
 should be ever so clearly entertained, that if the mat-
 ter were *res integra*, it would be impossible to intro-
 duce the doctrine, that the heirs of tailzie may thus
 deal with estates; yet, if you find that doctrine at
 this day part of the law of Scotland; to any notion
 of the inexpediency of such law you ought to pay no
 attention, but to pronounce the law simply as you
 now find it to be.

On the other hand, as a lawyer, I do not shrink
 from stating, that there may be a great deal of
 practice in transactions of a particular nature; there
 may be a great deal of understanding, as to the Practice, un-
derstanding,
and extra-ju-
dicial decision,
may be con-
trary to law.
 legality or illegality of that practice; and there
 may be a great deal of decision, where the point
 decided is not the point in controversy; which
 understanding, it must be admitted, is important;

* At this part of his address to the House, the Lord Chancellor observed, that in the March and Neidpath case, there were one or two of the leases expressly granted for the lifetime of the receiver, and the lifetime of the grantor; and that the question upon them would be, how far grassum affects them?

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which practice is strong ; and it must be admitted, that that general understanding is important testimony as to what the law is, and that the *dicta* of Judges, and what they have taken for granted in decisions not upon the point, are of great weight also, as testimony of what the law is ; but nevertheless, the law may not be as that practice, or that understanding, or those *dicta* would *prima facie* import it to be.

Course and
principle of
decision as to
teinds.

The present case affords a very strong and cogent illustration of the doctrine which I have been stating. You see in this case, that from a particular period, long before the year 1600, and down to the year 1732, it was the constant doctrine, and the uniform decision of the Courts of Scotland with respect to teinds, that they were to be valued upon the rent constantly paid, and without reference to grassums taken by the person to whom that rent was constantly paid. If any person had asked prior to the year 1732, what was the law with respect to teinds, he would have been answered, Who can doubt it ? Here are the doctrines and the decisions of the Courts ; and yet in the year 1732 the Court of Session itself decided, that all this practice, and all this understanding, and all these decisions, were not according to the law of Scotland. I do not say, that the same principle as between the land-owner and the person who is entitled to the teinds, is to be applied in considering the effect of a deed of tailzie, as between the heir of tailzie in possession and the person to succeed ; but I am only attempting to illustrate the observation, that both in England and in Scotland it has frequently occurred, that there is a great deal of practice, a

Practice, understanding and dicta, upon investigation, ascertained not to be founded in law.

great deal of understanding, and many *dicta*, and yet when the thing came to be investigated, that practice, that understanding, and those *dicta*, were found to be without foundation.

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In the Wake-
field case, for-
mer decisions
founded on
practice, &c.
overruled.

With respect to long leases, what has been the practice in Scotland—what has been the understanding with respect to them—what have been the decisions sustaining them? It is but a few years since the Wakefield case was brought into the Court of Session, when they decided, that their practice, that their understanding, that their decisions were wrong; and when this House decided upon the question, whether long leases were or were not prohibited as “alienation,” under that word “alien,” although it was represented that the whole law of the country would be overturned; yet the Court of Session in the first instance, and this House on appeal, were of opinion, that notwithstanding all that practice, all that understanding, all those *dicta* and decisions, the law of the land was, that the word “alien” in a tailzie which had prohibitory, irritant, and resolute clauses, did prohibit long leases as alienations.

Decision that
under prohi-
bition to
“alien,” long
leases are
prohibited as
alienations.

It is now stated in the papers upon the table, that “it is impossible not to admit, that there are grounds, “both in principle and authority, for holding a long “lease to be an alienation:” But they go on to state, “that the determination does not clash with the “fundamental rules on which entails depend.” They further add, and in their words I had rather point out the distinction than in any of my own—“but the question with regard to the endurance of “leases has no connection whatever with the question

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LEASES.Rule of strict
interpretation
as applicable
to leases.Alienation is a
transference of
property,
which a lease
is not, either
in Scotch or
English law.A lease is a
location of the
land, a per-
sonal right
under a
contract.A tack be-
comes a quasi
real right under
the Scots Act,
1449.

“ of grassum, and it is impossible to deduce any
 “ analogy from the one, which can bear even remotely
 “ on the other.” If this be so, the powers of my mind
 are not equal to discover what is the principle upon
 which long leasing is alienation, and short leasing is
 not alienation. If we are to take it upon the strict rules
 of the interpretation of tailzies, then we must say,
 that alienation means transference of property ;
 and a lease is neither in the law of England nor the
 law of Scotland, a transference of property. By
 the law of Scotland, until the statute of 1449, leasing,
 which in other words is called location, was a sort of
 right, (and so in the law of England), which the te-
 nant had to enjoy the premises demised, or tacked,
 not by virtue of any transference of the property itself,
 but having a mere possessory right, or a mere per-
 sonal right under the contract. In the year 1449,
 in Scotland, an act made it a species of real right ;
 but though a species of real right, it is not a species
 of real right deduced from alienation in the techni-
 cal and strict sense of the word, because alienation
 in the technical and strict sense of the word is trans-
 ference of property.

If it be the law of Scotland, as it has now been
finally determined to be *, that under a prohibition
 to alienate, a long lease is prohibited, and if
 it be the law of Scotland, that a lease is not a
 transference of the property ; yet, that in the con-
 struction put by the law of Scotland upon these
 deeds of tailzie, it applies strict construction to
 prohibit long leases ; and yet it permits, upon
 grounds not of construction, but upon other grounds,

* Wakefield case, *ante*.

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what are called short leases, or leases which are necessary for the manurance and profitable management of the land, however difficult it may be to declare that one lease is too long and another lease too short; yet we have at least got into this state, that every body seems to be agreed, that a lease of a certain duration is neither too long nor too short. I should say, if I were to lay down what I conceive is a duration of which that might be predicated, that a lease of nineteen years was neither too long nor too short; but whether I am right or not in saying, that a lease of nineteen years is neither too long nor too short, I know I am expressing myself according to the law of Scotland, when I say, that a lease of ninety years is too long; that it is an alienation, not because it is a transfer of property, but *because it operates as mischievously as a transference of property.*

Nineteen years
not too long
as a tack.Ninety years
too long,
because as
injurious as
alienation.

If I am asked why short leases are not prohibited, I cannot answer.—I have read these papers, till I can hardly tell what is in them,—and I have not been able to find expressly, and in terms, why a short lease is allowed. I am obliged, therefore, to see why a long lease is not allowed, and when I find why a long lease is not allowed, I find why a short lease is allowed. The *dicta* and decisions with respect to forfeiture, with respect to deathbed leases, and so on, have this expression when they strike at long leases, “they cannot be considered as tacks, “because they are not leases of necessary and ordinary administration;” some of them go so far as to say, because they have grassums. If this can be maintained that such is the principle upon which short leases are allowed, how can I be doing that

The reason
why a long
lease is pro-
hibited, fur-
nishes the
principle on
which a short
lease is allow-
ed, viz. ordi-
nary and
necessary ad-
ministration.

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Tailzies not
odious under
the stat. 1685.

which is charged upon me, altering the law of Scotland, introducing a change into the law of Scotland, or striking at principles upon which deeds of tailzie have hitherto been construed.

With respect to those deeds of tailzie, it is impossible to overlook that which I find scattered in every author, that they are *strictissimi juris*, that they are considered odious. Yet it is difficult to deal with that proposition as applicable in the year 1685, or to affirm that the tailzies established by that statute are odious. I agree in this principle, that as, on the one hand, it would have been wrong in any Court of Justice to have added to that act of Parliament, so on the other hand, I think it would have been equally wrong in any Court of Justice to have taken away from the fair effect of it; and as to the effect of these tailzies, I do not, as a Judge, enter into the consideration of its placing the property extra commercium, if they happen to make an estate tail into what may be represented as a perpetuity.—I think it incumbent upon the Court to say, that what is complained of as an act which amounts to a breach of a tailzie, is a breach of the tailzie within that act of Parliament which sanctions the tailzie; and if the question is, whether a long lease is or is not an alienation within the meaning of the author expressed in the deed, it must also be considered whether it is an alienation within the intent and meaning of the act of 1685. Now that act has not one word about leases; it speaks of such provisions and conditions as you might think proper to insert in tailzies, but it has not one word about leases; and when they get the length of saying, that a long lease is an alienation, I cannot concur in the opinion

which I see expressed elsewhere, that it does not follow, that because a long lease is an alienation, a short lease is an alienation. It seems to me that every lease must be an alienation ; but that it has been so long settled, and it is so necessary for the purposes of production and enjoyment that short leases should be endured, that it is impossible to disturb short leases, though you disturb long leases.

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Short leases
alienations
as much as
long leases ;
but endured
for the pur-
poses of pro-
duction and
enjoyment.

When we get to this point, there are many ways of considering the question with respect to those leases which were made by the Duke of Queensberry, and which are said to have been made for grassums.

In this case there has been a considerable abuse in the application of that word "grassum." We have it said here, if you take a small grassum, you may take a large grassum, and it is very difficult to say why, if you take a small grassum, you should not take a large one ; yet, I do not think it absolutely follows, that a sum may not be so very large as to be too large even to be a large grassum, so that that term grassum cannot be properly applied ; and when I see the heir of entail on an old rent of 3*s.* a year, taking 300*l.* by way of grassum, I should be glad to ask any lawyer in Scotland, of the century before the last, whether he had the least notion that the sum of 300*l.* taken for a lease where the rental was only 3*s.* was in the law of Scotland *bond fide* a grassum ?

Improper use
of the word
"grassum."

This must be taken in two or three points of view. We must inquire first, what *is* the law—not what *should be* the law, if this were *res integra*. If the case is not touched by decision, we are next to ask what is the conclusion we are to come to, regard being had to the contents of these deeds of tailzie, and the

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nature of that which has been done under these specific deeds of tailzie?

Now, inverting the order a little as to these considerations: first of all, I call your attention again shortly to what has been the practice; and although I think, that upon the analysis of the several cases in this list of leases which are here printed, the practice will prove to be infinitely less than it appears upon first sight to be, if you take for granted that all the leases stated in this list of leases were let for grassums; yet it is impossible for me to deny (and I ought to admit every fact which bears upon the question that will enable your Lordships to try the opinion I may give) that, even upon an analysis of these cases, looking at each and every of them, there is enough to form a considerable body of practice. I might also admit as probable, that no research can have been so effectually made, as to bring before you the full amount of this practice. There are many heirs of tailzie who are not inclined and will not be advised to assist such inquiries. I might also admit, that you have cases, in which parties have come into Court, not questioning grassum at all, in which Judges have stated certain *dicta* with respect to grassum, which must also be taken as evidence of the law; and where you have decisions, except those very lately indeed, in favour of grassum. To this I must add, that it is stated in these papers, and not denied, that the former possessor of this estate let many leases for grassums. The practice is also extremely weighty. Sir Ilay Campbell, who states the result of his experience during a long professional life, in the course of which he has been in every respectable situation of

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the profession, where he has had occasion to advise and to give judgments upon leases, states his idea of grassum in such a way as to amount, I must admit, to very strong proof of what has been the practice, and to afford strong proof of what he considered to be the law ; and there can be no doubt that his conceptions of what is law, are very much to be regarded by those who are called upon to pronounce the law judicially, although he merely gives an opinion, and was never called upon to pronounce judicially upon the very point in question ; but if he had been called upon to pronounce it, there can be no doubt what his opinion and judgment would have been.

On the other hand, there are an infinite number of estates tail, in which, as it is represented, and without contradiction in these papers, leases have not been granted on grassums. But as to this tailzie of the Duke of Buccleuch having been made in 1705, it does appear that grassums, in the fair sense of the word grassum, on short leases, were taken by those who had the care of the Queensberry estates while the Dukes were minors, or while some Duke was minor, and that the persons who in succession had the care of the estate, were persons who, from their situation,—the judicial situations they held in the country,—were likely to know what they could and what they could not legally do in the administration of the estate of an heir of tailzie.

There is another circumstance, which is evidence of practice, and of the law ; namely, that in many cases, heirs of tailzie are prohibited from letting for grassums. I believe that those prohibitions are not of very ancient date ; but, whatever may be their

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date, whether it is more remote or more proximate, the fact that there are such prohibitions in deeds of tailzie restraining heirs of tailzie from letting with grassums, is some evidence at least that at the period at which such tailzies were made, and such prohibitions inserted, it was thought necessary there should be such prohibitions, and therefore it was thought you might let with grassums, provided there was no such prohibition in the tailzie.

Decisions.

With respect to the decisions upon the subject, I pass over the Church cases and the Crown cases, with the observations which I have made upon them, as bearing or not bearing upon this question. You will find them all stated at large, in the cases upon the table, and I cannot add to them ; but there is nothing which bears as decision upon the point which I am now putting. I pass over the case of *Leslie v. Orme*. In that case, there was a grassum, but the case was not decided upon the effect of grassum ; and it must be admitted, that the fact that it was not decided upon the effect of grassum is a fact of some weight. In that case, the lease for four nineteen years was sustained by this House. I can do no more than refer you to the observations which were made upon it, in the cases formerly in discussion in this House*.

Leslie v.
Orme.

Denham v.
Wilson,
15 Jan. 1761.

With respect to the Westshiells case, so far from being an authority in favour of grassums, it is in principle an authority against them. In that case the pursuer did not complain of grassums, and the defender had no complaint about grassum to answer. It was an action which did not strike at a lease on which grassum had been paid. It was an action by

* As to this case, see the observations of Lord Redesdale, *post*.

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a succeeding heir of tailzie asserting that he was entitled to consider as rent certain payments, which were secured by bonds and bills ; and that the person to whom those bonds and bills had been assigned, was not entitled to take the money secured by the bonds and bills, because the heir said that whatever their apparent nature was, they were really securities for rent, and the rent of course belonged to the heir of tailzie who had succeeded to the estate. In that case several tenants took leases from the heir of tailzie in possession. With respect to many of them, they were made according to what they considered good practice. They took leases, and paid grassums down. With respect to others, the lessees did not pay grassums down, but they said in effect, we have not money to advance, but inasmuch as the heir of tailzie, according to our notions (I am now putting language into their mouths which I think their acts spoke, if their mouths did not utter it,) is not prevented from letting without diminution of the rental, (for that was a case, as appears by the papers on your table, in which the heir of tailzie could let, provided he let without diminution of the rental,) therefore, though we cannot now advance the grassum required, we will do what comes to exactly the same thing—we will take the lease at the old rent ; that is, we will take it without diminution of the rental, and you have a clear right to grant it, (as we say, and as you say,) without diminution of the rental, and instead of paying you a grassum, which is defined in some of these papers to be a sum of money paid at the commencement of the lease, we will not pay at the commencement of the lease, but we will give you

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something payable not on the land leased, we will give you bonds and bills for so much money, (those, to be sure, were for annual payments,) and, (as they contended), it makes no difference either with respect to the validity of those leases, or the claims of the heirs of tailzie to come afterwards, whether we stand simply in the relation of tenant to you the landlord or not. The transaction creates between us the relation of debtor and creditor; the heir of tailzie has nothing to do with that transaction. If you look at the opinions of the Judges given upon the hearing of that case, some say this is grassum, others say this is rent, others say that it is a deception, and that it must not be performed by a bungling operator, and so on. Sir Ilay Campbell's note of what passed, is a very curious testimony to show how clear the law was in that year 1761, with respect to the powers of heirs of entail.

In the first instance, they all decided, (and certainly there again it is authority to be regarded, both with respect to the practice and with respect to the law itself)—they all decided that it was not grassum, and deciding that it was not grassum, whether the lease was good or not good, being granted for grassum, was a question they had not in that case to determine—it was not before them. They found, that as the succeeding heir of entail had not sought to affect this lease on the head of grassum, the Judges had nothing to do with it; that if they could not bring the sums granted under these bonds and bills into the account as rent, they could do nothing. And they could do nothing;—why? because the parties had not upon that subject submitted any

thing to them ; and therefore, all that is said about grassum in that case, appears to me to be *obiter dictum*. The argument, which was repelled upon the second hearing, was an argument submitting to the Judges in that action, that the sums due upon the bonds and bills were not sums demanded in the action. It is impossible for the mind of man to say, that there is any sound distinction between a grassum that is paid, and a grassum that is agreed to be paid, and secured.—If it be rent, that is another matter.—There are two most able papers on the subject ; but notwithstanding the ability with which it was argued that this was rent, and notwithstanding the decision that it was rent, I must take the liberty of saying, that after looking at that case again, and again, and again—after paying all the deference I can pay to the judgment—and after admitting all the weight that appears to me to be due to the great authority of the counsel of that day who signed the memorial before the Court of Session, I never can agree to that decision.

I say further, that when I see in these papers that grassum is treated as a thing impossible to be rent, because you cannot apply the remedies to grassum which by law and by acts of sederunt may be applied for the recovery of rent, I should be glad, if any body would tell me how then it was possible to apply those remedies to the payments secured under those bonds and bills. I am very far from saying that is a reason why it should not be considered as rent. Mr. Cranstoun has satisfied me, there may be such a thing as a fraud upon an entail. He has given instances in the memorial addressed to the Court of Session, where

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No sound distinction between grassum paid and grassum payable on security.

Decision in the Westshiell's case disapproved.

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of the decision
in the West-
shiell's case.

one thing appears, and another thing is that which is designed. There is therefore no doubt on my mind that there may be fraud upon an entail; and I agree, that if this was meant to be a fraud upon the entail, by taking these bonds and bills not *eo nomine* as rent, but really and truly as rent, the trustees using this device to prevent the heir of tailzie or the Court of Session from saying what was the real transaction, the fraud might be overreached by the Court. But then the difficulty I have upon my mind is this, if the heir of tailzie could take the grassum which he did from tenant *A. B.* and could take the grassum, which he did not instantly take from tenant *C. D.* but *bona fide* agreed with *C. D.* that grassum should be thereafter paid, and paid by certain instalments; if the parties make a lease, which upon the hypothesis of what the law was then, was a good lease independently of that collateral transaction, by reserving rent without diminution of the rental, it appears to me, that to say because they have thought proper to constitute the relation of debtor and creditor, therefore the fruits of that relation were to be considered as rent, and to be ascribed to the relation of landlord and tenant, is a consequence that does not follow at all. The Westshiells case goes no farther than this, that the Judges of that day took it for granted that grassum was allowable where there was no diminution of the rent of the day, a proposition admitted by the pursuer, and not contended against by the defender; and they decided, that what was secured by these bonds and bills was rent, and was not grassum.

If that case had come before me as a Judge, I must have said I could make no distinction between

a grassum paid directly, and a grassum secured by way of future payment, that they are both of the same nature, and that unless both could be recalled (recalled is perhaps too strong a word to use, for there may be equities with respect to those grassums) but that unless they can both be objected to, he who admitted the right to take grassums upon that deed, ought in that case to have been held to have no right to call for the payment to him of the sums secured by those bonds and bills.

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LEASES.Principle of
decision in the
Westshiella
case dis-
approved.

This brings to my mind the case now pending on appeal to this House, the case of the *Earl of Elgin v. Wellwood*. If nothing is grassum but what is paid at the commencement of the lease, how are your Lordships to deal with the case of the *Earl of Elgin v. Wellwood** : there the grassum was no less than 12,000 *l.* which is not to be paid at the commencement of the lease, it is to be paid at the death of the landlord or the tenant ; and that is a case which includes the other question, namely, whether, where there is a power or faculty to set tacks for such time as the party thinks proper, making such reservations as are thereby prescribed, letting for the term of 999 years is to be considered as setting a tack, or whether that was not to be considered as an alienation, notwithstanding the permission contained in the lease to which I am now alluding ?

D. P. July
1820, *post*.

With respect to grassum, as with respect to long leasing, much difficulty has been introduced by some

Late decisions
as to grassum
and long
leases

* Since decided in favour of the respondent, principally on the nature of the rent to be reserved and the permissive clause by which the heir of entail was permitted to make such tacks as he *should think fit*, reserving ten bolls of corn per acre by way of rent.

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LEASES.M^c Gill's case.

late cases.—It is not my intention to go through them all ; but I will call your attention particularly to the case of *M^c Gill** ; in the printed opinion of one of the learned Judges the following account is given of that case. He says, “ the property was very considerable. As I was counsel in the cause, I can speak with some certainty. It was an action by the guardians of a minor heir of entail, whose father, on account of the very slender provisions allowed by the entail to his widow and younger children, had granted a lease of a part of the lands to a trustee for their benefit, with an expectation of its being afterwards let at a higher rent. The question was not very anxiously contested ; the guardians, who were desirous that the additional provisions should be made good, having acquiesced in the first interlocutor that was pronounced, although some of the Judges expressed doubts as to the validity of the transaction. For this reason, I presume the decision is not mentioned in the reports, although a question of smaller pecuniary importance between the same parties is there noticed ; and of this I am confident, that it was not considered by the Bar as a precedent upon which the country might rely. One case I remember, where an heir of entail in an estate yielding between five and six thousand pounds a year, was prevented from providing his widow in a jointure of more than 200 *l.* a year”—(I hope, that whatever may be the decision upon this case, something may be done by Parliament by way of regulation upon this subject, and without delay, for the purpose of giving security to what perhaps this decision might other-

* Not reported.

wise tend to shake, and prevent having effect)—
 “ upon the authority of the decision in the case of
 “ M^c Gill, he proposed to grant a trust lease of cer-
 “ tain farms, which it was supposed might yield in-
 “ creased rents when the current leases were at an
 “ end. The answer by the counsel was, that there
 “ could be no objection to the granting of a trust
 “ lease; but that, as no certain reliance could be
 “ placed upon it in a question with the succeeding
 “ heirs of entail, the trustee should have it in view,
 “ out of the surplus funds, while the heir of entail
 “ lived, to accumulate such a sum as might be ne-
 “ cessary.” I cannot conceive that this case can be
 considered, after what I have read, as a case of
 grave authority.

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not a grave
authority.

Your Lordships will obtain a very correct idea,
 which will enable you to be more precise in your
 views of this subject of grassum, from a paper printed
 in a case which I have now in my hand, and which
 has the name of “ Blair, Solicitor-General, as to the
 “ mode of making a lease subject to provisions for
 “ younger children,” undoubtedly with a view of
 avoiding what my Lord Alemore calls a bungling
 operation. He puts it thus: “ What occurs to me
 “ as the most unexceptionable mode of conducting
 “ a transaction of this kind, if the execution of it
 “ shall be found practicable, is this, that the new
 “ lease should be granted for a real grassum to be
 “ drawn by the memorialist at the time, not from the
 “ occupier of the land, but from some third party,
 “ or any other person who shall agree, in consider-
 “ ation of getting the new lease in his name, to
 “ advance a sum of money equal, or nearly equal, to

Blair's opinion
as to the best
contrivance
for obtaining
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“ the value thereof, to be drawn back by him from
“ a sub-tenant yearly, during the currency of the
“ lease. For this purpose, it will be necessary, in
“ the *first* place, to fix with certainty the value of
“ the new lease, which can be done by previously
“ making an agreement with a person who is to oc-
“ cupy the land in character of sub-tenant, at such
“ rent as the land may be worth. The surplus
“ rent, therefore, which is to be drawn by the
“ principal tenant, being thus known, it becomes
“ an easy matter of calculation to ascertain what
“ is the present value of such surplus rent for the
“ space of nineteen years, or whatever may be the
“ endurance of the lease. If any person can be
“ prevailed upon to advance a sum in the name of
“ grassum equal to the present value of the lease so
“ calculated, making however a reasonable allowance
“ for the trouble and inconvenience of being reim-
“ bursed by yearly payments from the sub-tenant,
“ the transaction I think would answer every purpose
“ which the memorialist has in view. The person
“ advancing the money would be the principal tenant,
“ paying a grassum for a real lease granted in his
“ favour at the old rent, and drawing an annual sur-
“ plus rent from the sub-tenant, who would just be
“ liable to pay the rent which he agreed for, without
“ having any connection with the grassum, and the
“ memorialist would draw a sum of money which
“ would be entirely at his disposal. Upon the sup-
“ position that the heir of entail has the power of
“ setting farms at the old rent and taking grassums,
“ (which is understood to be a settled point), I do
“ not see upon what grounds such a transaction could

“ be challenged.—There may be a difficulty in getting a person to advance money upon the security of a lease, and on the prospect of being reimbursed out of a surplus rent.”

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This is a mode in which a transaction of this sort is thought to be most advisably carried into execution; but when this mode is stated to have had the opinion of so learned a man as Mr. Blair, it must be admitted that it is “ upon the supposition that the heir of entail has the power of setting farms at the old rent, and taking grassums; which is understood (as he says) to be a settled point.” But upon such a transaction, if you are to look at the real nature of it, what in the world is it but anticipation of rent? The lease is to be let at the value of the land; there is to be a previous agreement for a lease at the value of the land; an estimate is then to be set upon such a lease, that is, in other words, having agreed for a lease upon the full value of the land, another lease is made to somebody else at the old rent with a grassum, and the heir of entail in possession is to have the disposal of this grassum if he has got it; or if he did not take the grassum, somebody else is to have the benefit of the lease, with regard to which a calculation is to be made of the grassum. If that is not anticipation of rent, there surely is nothing prohibited.

Blair's opinion
founded upon
assumption of
the point in
question.

Grassum is
anticipated
rent.

I have called your attention to what has been considered to be grassum, and contrasted that with what passed in the case of Westshiells, where bonds and bills were taken, it not being thought necessary that the rent should be increased, and those bonds and bills were held to be rent, because they said they

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were connected with the transaction. But how it can be held that grassum is not anticipation of rent, consistently with the opinion given in the Westshiells case, is a difficulty I cannot get over.

Great as the name of Mr. Blair is—and there never did exist in the judicial state a man entitled to a higher character,—it is impossible to look into these papers without seeing how unsettled his notions were as to the question whether long leases might be granted of entailed estates.

The question, if not concluded by authority of precedents, to be decided by principle.

The result of the whole in reference to *dicta* and decision, coupled with practice, will be, whether there is or is not so much of decision upon this point as to have become settled doctrine, hallowed and sanctified by time ; so that if this case had been agitated some thirty or forty years ago, we must have come to the same decision. No one can state more strongly than I should be disposed to represent to you, that the current of authorities in the Court below, standing on grounds that could not be shaken, must be considered to have been established on sound principles, in order that the law may be settled. But here the question at last would be, whether you have so much of decision upon this point as precludes you from examining what is the principle upon which you have acted in other cases, and particularly with respect to long leases, to which I have before alluded.

Diminution of rent, except in cases of necessity, prohibited under a tailzie by quasi implication, on the principle that it is not an

It has never been suggested that rent could be diminished under a tailzie. I must be understood to be speaking, not of tailzies containing express prohibitions, or under circumstances where it is of necessity that the rent is diminished ; but of tailzies where there is nothing about diminution of rent in the tailzies

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—of tailzies where the necessity of reducing it does not occur from the state of the times, and where you are therefore to look at the charter of tailzie, which prohibits alienation and long leasing, and that upon a principle which has been stated in all the cases in which that prohibition has been mentioned. Can it be said, notwithstanding long leases are prohibited by the prohibition to alienate, yet if there is nothing in the charter that prohibits diminution of rent, and if there is nothing in the circumstances of the times which warrants diminution of rent, the heir of tailzie, who cannot grant a long lease, because that is not for necessary and ordinary administration, may, nevertheless, sink the last rent to the lowest sum, which is a farthing above illusory rent. I beg to ask what a system of law must that be which says, you shall not let a lease for thirty years, (I take this duration for the purpose of illustrating what I mean, though we have got no lower than fifty-seven; your Lordships have said fifty-seven years is prohibited, because that is in its nature an alienation; and that it is in its nature an alienation, because it is placing on the tailzie an incumbrance, not of necessity and for ordinary administration), and yet, if there be no prohibition of that kind, that word “alienation” will permit you to sink the value of the estate for nineteen years, if that is the longest term which the word alienation will permit, whether grassum is paid or not, to such a sum as is just one single farthing above that sum, which will constitute an illusory rent. It is not immaterial that the question should be considered in this point of view, because I admit that if the law be so, if you can do that, it bears strongly upon your power with respect to the present question; but if

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act of necessary
and ordinary
administration.

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the law be so that you cannot do that, I will not call it an implied prohibition, but I do say that it is a non-capacity, imposed upon the heir of tailzie, represent him as much as you please as the absolute fiar or manager of his estate—imposed upon him, not by the terms of the tailzie, but by the same principle which imposes upon him the restraint, not to let leases for ninety-seven or fifty-seven years, or any number of years not of necessary and ordinary administration.

Opinion of
Scotch Judges
as to implied
prohibition or
incapacity of
heir of tailzie
to diminish
the rent.

There is certain evidence of what is the law upon that subject. In the first place, something is to be found upon the subject in these papers. Lord Meadowbank in one case states, that diminishing the rent much, he would call even fraud. There is one of the Judges who says, he would not permit a diminution of the rent. Sir Ilay Campbell, according to the paper which I read to you, certainly supposes there could not be a diminution of rent; he conceives from the nature of a tailzie that a diminution of rent could not take place, unless there is a necessity for such diminution. Upon what grounds do these opinions rest, unless it be that such incapacity is imposed upon the heir, not for his own sake, but to preserve a just dealing with the tailzied estate.

I can never come to the decision of a Scotch cause, which involves an important question, without fear and trembling. It would be folly for any man in my situation, to suppose he is to deal with questions of Scotch law, as he would with questions of English law. I always recollect, that with respect to the judgments of the Courts of Scotland, it is our first duty to employ ourselves industriously in investigating those subjects which come before us,

and I know it would be ridiculous to suppose that the nature of our jurisdiction is not open to error, from the circumstance, that those who have to advise your Lordships can only occasionally inform themselves. But with much diffidence in myself, and great respect to others, I am bound to preserve my independence as a Judge, and weighing every circumstance, to enable me to form a solid and a right opinion, I advance to that point in which conscience will not permit me to speak other than the language of the law.

With these observations, I apply myself again to what is the law of Scotland with respect to mansion-houses and policies. It is admitted since the *Greenock case* *, the *Roxburghe case* †, and others which might be mentioned, that the heir of tailzie cannot disappoint his successor of the mansion-house and policies; yet the author of the tailzie has not prohibited him by a single word, for this doctrine applies to those cases, where the author of the tailzie has not prohibited him from doing what he pleases with those mansion-houses, and those policies; but yet the law has said they are the residences of the heirs of tailzie in succession, and we will imply the prohibition. But leases, they say, of mansion-houses and policies are not protected by the act of 1449. Why are they not protected by the act of 1449? You find words by which lands and tenements are protected by the act of 1449, yet you find the cases mentioned in which as to lands and tenements that act is not applied to protect them.

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Cases of
Greenock and
Roxburghe.
Implied prohibition against
leasing the
mansion and
policies.

The Scots Act
1449, by its
general terms
extends to
mansion-
houses and
policies.

* *Cathcart v. Shaw*, Jan. 31, 1755; D. P. March 19, 1756.

† *Ker v. Roxburghe*, D. P. 1813, MSS. cases, and 2 Dow. 149.

See *Ante*, p. 408.

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Tenants in fee simple, those who in the largest sense are absolute fiars, have an unlimited discretion as to mansion-houses and policies. This was strongly impressed upon the minds of Scotch lawyers in the Roxburghe cases, by the great professional talent of Mr. Clerk. When the feus were made, it was thought necessary to except and reserve for the succeeding heirs of entail, the principal mansions and many acres of land adjoining. Upon what principle was this?—it was thought to be contrary to the intention of the author of the tailzie, who had not said one word about his mansion-house, to permit it to be given out of the possession of those who he hoped would there maintain hospitality among their Scotch neighbours, and continue to receive the respect so justly due to the Scotch nobility.

Power of
selling wood
to be cut after
death of, &c.

As to the power of selling woods (to be cut down after the decease of the heir of tailzie), I never considered that as an implied prohibition; I said only that in such respect he was not the same monarch, having the same unlimited estate and power over his lands as an English tenant in fee simple, or the absolute fiar in Scotland. The tenant in pure fee can sell his wood to be cut, and this shows that the principle is not generally applied. There is no doubt, that the Scotch heir of tailzie may denude (to use the word) the estate of every stick upon it, timber, and saplings, and every thing else that should be permitted to grow; in short, he may do all the waste he can do in the course of his life. That is what our tenant in fee can do, but what our tenant in tail cannot do.

As to the objections arising from the difficulty and

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uncertainty of the proposed rule of law in its application, the same occur in the Courts of this country when they are required to decide what is an illusory share of a sum of money which a man has a right to appoint. Mr. Selden was certainly wrong in saying, that the decision of the Court of Chancery depended on the length of the Chancellor's foot. But I may admit as an exception or qualification, that when the Court comes to decide what is an illusory share, that does very much depend upon what is the length of the Chancellor's understanding. Sir W. Grant was so sensible of the difficulty, that he came to the decision, that he never would hold any share to be illusory, which no former Chancellor had done*. The question comes to this, What is the principle which you are to apply to this case, and what does that principle require of you? Unfortunately that is open to what arises by way of observation, I mean according to legal opinions and criticism, upon the words of the charters themselves.

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LEASES.

Difficulty and
uncertainty
in application
of law.

Case in law of
England—
illusory ap-
pointment.

I endeavoured, when I read in one of those charters, in the March and Neidpath entail the words, "without diminution of the rental," to see how I could deal, upon any construction which I could put upon those words, with a great variety of questions which may possibly arise. What does this word diminution of the rental mean with respect to time? Does it mean, that you are to look at the date of the charter, and that you are to preserve always the rent as it is stated in the charter? If that is the case, would it be called a diminution of the rental, supposing the rental of this estate

Construction
of the words
diminution of
rental.

1st Case.
Lowering the
rent of one
farm and
raising another
in proportion.

* See *Butcher v. Butcher*, 9 Ves. 399.

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LEASIS.

to be 10,000 *l.* a-year, if the tenant in tailzie in possession lets farm *A.* at 100 *l.* a-year more than it before let for, and farm *B.* at 100 *l.* less? In one sense, that is no diminution of rental. Suppose he lets farm *A.* for 100 *l.* a-year more, and lets farm *B.* for 50 *l.* a-year less than it was before let for, there being upon the whole a gain of 50 *l.* in the rental, Is that a diminution of the rental or not in the law of Scotland? I have no means of answering that question but by stating that a great authority * says, he thinks the heir of entail is not entitled so to deal with the estate, but that he is bound to raise the rents in proportion. So that you have to determine, if you take this limited sense of the word, "without diminution of rental," whether that means a diminution of the total quantity of rent upon the whole of the farms, admitting of a diminution of rental for parcel of the estate, but still preserving the whole quantum of rent upon the whole taken together. According to the opinion to which I have adverted, if you diminish the rent of farm *A.* though you still preserve the quantum of rent upon the whole, by raising farm *B.* in proportion, you do not answer the Scotch idea of the meaning of these words.

2d Case.
Where the
author of the
tailzie dies in
possession of
part of the
lands entailed,
which have
never been let
at a rent.

There is another case we must look to, in order to know what this means. Suppose, that when the author makes his tailzie, he is in the natural possession of a part of the estate, that other part of the estate is in possession of tenants:—he dies:—the next heir of tailzie makes a lease, and he is to make a lease without diminution of the rental; what is

the sense of the words “without diminution of the rental,” with respect to those lands of which his predecessor was in the natural possession, and which perhaps never were let at any rent at all? or they may have been let at some rent, before the time of the author of the tailzie, who, during his time, was in the natural possession? If they never were let at any rent previous to that time, then the words “without diminution of rental,” with respect to that estate, cannot, in the technical sense of the words, mean without diminution of rental; because, according to that construction, he would be empowered to let the whole estate, including all that part in the natural possession of the entailor, for the rent of that part not in the natural possession of the entailor. To get rid of that difficulty, you must take the true value of that which was never let before, and so the words “without diminution of rental,” do not necessarily bear the technical sense of those words; but in order to give a rational construction to those words, you must take into your consideration the value of that on which there can be no diminution of the rental.

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Suppose again, that the land in the natural possession of the entailor had fifty years before been let at a rent, Could it be said, (something like it has been said lately, but I cannot assent to it,)—could the next heir of tailzie, being bound to let without diminution of the rental, say the author of the entail was in the natural possession of this part, which was worth 5,000*l.* a year during his possession; but the last time this was let, which was fifty years ago, it was let at 2,000*l.* a year; I will let farms A. B.

3d Case.
Land in possession of entailor let 50 years before at a low rent and since doubled in value.

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C. and *D.* which were not in the natural possession of my author, at the rent which they yielded when the entail was made ; but with respect to that which was in the natural possession of my author, and which, if it had not been in the natural possession of my author, would, before his death, have increased from 2,000*l.* to 5,000*l.* it is no diminution of the rental to pass over the period of his enjoyment, in which the value of it had so much increased—I will take the 2,000*l.* a-year, as a ratio of the rent. I say that is impossible. I have therefore, when I read these words, asked myself what they can mean. Here is annexed in the papers, the rental to the tailzie—Is it then to be contended, that the manner in which it is to be discovered whether there is an evident diminution of the rental or not, is to put upon the heir of tailzie the obligation to see whether there is sixpence abated from the former rental. I cannot conceive that to be the meaning of the author of the entail. I am of opinion, that the words “ without evident diminution of the rental,” mean without diminution of such fair rent as may be obtained.

“ Without evident diminution,” &c. means of such fair rent as may be obtained.

Difficulty to ascertain fair rent imaginary.

We are told no person can deal with this decision ; that you put such a difficulty upon the heirs of tailzie, that they must go to what in this country we call auction, and what in that country they call roup ; that it will not be safe for them to act at all. To that I answer, I feel no difficulty in the world upon that subject. And when we are told, as we are told over and over again in the papers before us, that he who is not to diminish rent, is not bound to increase it. I apply the principle which appears to me

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to be a very fair principle to apply. You are not bound to increase it, I admit; but you are not bound to increase it, for this reason, that it may be taken, if you do not, to be the just rent. In this country, (and do not let it be supposed I am confounding the powers of tenants in tail in this country, with those of tenants of tailzie in Scotland), in a similar case, the author of the power always imposes it as a condition, that the lease shall be made for the best rent which can be obtained. Then what is the evidence, upon the execution of the power? Show me that he takes no more for himself than he leaves for his successor, and that is evidence * that it is the best rent which can be obtained. Show me that he does for himself only that which he does for others, and no difficulty can arise.

Where tenant in possession takes the same rent for himself and those in remainder, there is presumptive evidence that it is the best rent which can be obtained.

Suppose a man of the age of eighty, (and the Duke of Queensberry was about the age of eighty when he made some of these leases,) calculates his own life, and says, I may live for five years—Now, I will let for nineteen years; at 1,500 *l.* a-year for five years, and 500 *l.* a-year for the rest of the nineteen. It was positively asserted, but I really cannot give my assent to the proposition, that such a lease as that could not be set aside by the succeeding heir of tailzie. I will not say that it can be, but there has been no instance produced of such lease. What is the state of the law of Scotland if grassum can be so taken: such a contrivance would not be endured by the law of Scotland—What does it amount to? The heir in possession says, I will take a grassum of

A lease for 19 years, reserving a large rent for the first part of the term, and a smaller rent for the remainder, is a contrivance to take grassum, which would not be endured by the law of Scotland. There is no instance of such a lease.

* Presumptive. *Vide ante*, p. 428.

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5,000 *l.*; my way of taking that grassum of 5,000 *l.* is not to take it in one sum, but to divide it into payments for the first five years, and then, at the expiration of the first five years, those who come after me, instead of having 1,500 *l.* a-year, shall have 500 *l.* a-year. No, says the law of Scotland, you shall not have it so; if you mean to take it at all, you shall have it once for all—you may not take such an advantage by instalments, but you may take it at once in the name of grassum. I should be very glad if those who are more conversant with this subject, would tell me upon what principle such a doctrine can stand. The case may be thus illustrated: Here is a farm called *A.* and another farm called *B.* each of them was let: the last rent was 100 *l.* I am obliged to keep up the old rent, at least it is contended that that is so, as far as I can judge, I think it is so, and upon my opinion that it is so, I must decide with respect to farm *A.* and I take 500 *l.* and let it for the old rent; but with respect to farm *B.* unless I can get that 500 *l.* paid down to me *in præsenti*, I cannot apportion it on the first four or five years of the lease; for what I receive *de anno in annum* must continue. Now that this is the state and principle of the doctrine there can be no doubt.

Construction
of the words in
the Queens-
berry entail.

If this view of the case be right, on the words “*evident diminution of the rental*,” I think there is no difference with respect to the words contained in the prohibitory and irritant and resolute clauses of the Buccleuch case, “without diminution of the rental *at the least at the just avail for the time.*”

Opinions of the
Scotch Judges.

Looking at the opinions which have been deli-

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vered, it is curious to observe the different views which the human mind takes of the meaning of words. Some of the learned Judges are clear of any doubt whatever, that these words mean, at all events at the just avail at the time : others of them are clear, without any doubt whatever, that it means no such thing, and that it means, that if you cannot get the last rent, you must not let the estate at all : others are of opinion, that you might let it at the last rent ; and if you do let it for less than the last rent, you shall let it at least for the just avail at the time. These opinions are supported by many very curious and ingenious cases.—They say, if you hire a workman for twelve hours, or from sunrise to sunset, you must pay him, if he has employed the interval between those periods, if there are not twelve hours from sunrise to sunset. I say that is all very well ; but you are dealing with other subjects. Another learned Lord says, if I order my servant to go with my corn and sell it at its value, that is, at the market price, at least at the market price the preceding day ; what should I say to my servant if he came back again, and said, I did not sell it at the market price of this day, but I did sell it at the market price of the last day ; but, Sir, I have to inform you, that when I went to market, I was bid three times as much for it as the price paid on such day. The master immediately says, the servant cannot possibly have understood my meaning—My meaning was this ; get the market price of the day if you can, at least get the market price of the former day ; but do not conclude from my saying, you are to get the market price of this, or the market price of the last day, that

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Meaning of
the provision
in favour of
the heirs of
tailzie in
succession.

I mean to authorize you to sell my corn at half its price, if you can get double the market price of either day.

The question then is reduced to this : What is the meaning of the provision which is made in favour of the succeeding heirs of tailzie ? I think the meaning of it is this ; by way of direction to the heir in possession—"get what you can—recollect what is the "rent—do not let it be diminished, unless it is "necessary it should be diminished ; take the just "avail at the time in all cases, not in that case only "when the just avail at the time is less than was the "rent before actually paid." The person making the entail could not have meant to say, "I have "not the slightest wish or intention that my heir of "tailzie should get the value of the estate ; I mean "to let him take less than the present rent, if he "cannot get the present rent ; but although I guard "against his taking less than the just avail at the "time, I do not mean that he should take the just "avail at the time, when that is higher than the "present rent."

If grassum by the Scotch law is anticipated rent, the leases made under the entails in this case are void.

All law must stand on principle, unless principle and argument precluded by continued decision.

If notwithstanding what has been the practice, and notwithstanding any thing that may be called decision, there is a principle upon which you are entitled to say that grassum is anticipated rent ; if that is now the Scotch law, these leases cannot be maintained. God forbid you should say it is the Scotch law, if it is not so ! I would not say it, if I were not convinced it is the Scotch law ; but all law ought to stand upon principle, and unless decision has removed out of the way all argument and all principle ; so as to make it impossible to apply them to the case before

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you, you must find out what is the principle upon which it must be decided. After all the consideration I have been able to give to the case, my opinion is, that grassum is anticipated rent ; what constitutes it so, and what may be the effect of such a decision, may require a good deal of consideration, with a view to apportioning that anticipated rent ; or if the tack is such a tack as the heir in possession ought not to have made, to decide to what extent you will place in situations of inconvenience, persons exposed to all the inconvenience which may arise in consequence of such a decision.

I do not advert now to the alternative leases. With reference to the question whether they are good or not, I am not sure whether it would not be my wish to remit so much to the Court of Session, if the alternative leases steer clear of the objection which applies to the others ; but I do not find that any of those leases are clear of the valid objection on the ground of grassums, if it be a valid objection, not even the cases of Crook and Flemington Mill.

Entreating your Lordships to believe that I have given to this subject a degree of painful attention, which I hope I shall be relieved from ever giving to any other, if I am in an error, I cannot extricate myself by the operations of my own mind ; and the view my mind takes of the subject, that view my conscience obliges me in my judgment to express. With these observations, I conclude this matter to-day, and on a future day will propose to your Lordships some findings which may be, in my opinion, agreeable to the principles which I have stated.

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L. C.
12th July.

WITH respect to the leases of Flemington and Crook, and likewise a farm called Edstoun, it is insisted there were no grassums ; it is likewise insisted, that if there was any diminution of the rent in point of fact, it was a diminution rendered absolutely necessary by the circumstances under which the heir of tailzie was placed—he not having the power of letting at the same rent. These are cases also in which the summons has the alternative conclusion, that if these very long leases are not good, certain leases of certain durations there mentioned may be permitted; and the Court seems to intimate an opinion, that the alternative leases might be good, provided there was no fault on the part of the tenant. With respect to the leases depending upon that question, both on account of the manner in which the title on the part of the tenants has been created, which seems to me not to have been sufficiently investigated ; and likewise on account of the extreme importance of the question, Whether leases with alternative durations can or cannot be sustained as tacks? on reconsidering which question, I have not been able from the papers laid on your table, or on the search I have been able to make into books, to find sufficient reason to offer to your Lordships a decided opinion upon the point. With respect to the Flemington and Crook case, I shall propose to your Lordships to remit these cases to the Court of Session, generally to review the interlocutors complained of, and to do therein what may be just.

As to the supposed matter of equitable consideration, which is proposed for the consideration of the

House, whether you can look at these grassums as taken generally for the benefit partly of the heir in possession and partly for the successor, and apportion them, there certainly is a passage which has been pointed to my attention since I last addressed your Lordships, which somewhat indirectly brings that forward for consideration.—On looking into the papers, it appears to me to be quite impossible that it should be disconnected with the question of purging the irritancy ; and as this question has not yet been discussed and decided in the inferior Court, we cannot entertain it as a matter of original jurisdiction ; and whatever, therefore, may be the decision with respect to that case, I am not aware that if your Lordships adopted an opinion as to the power to make tacks, and as to the validity of the tacks, that they should be shut out from proposing it to the Court of Session. With respect to my own opinion, I shall say no more than I intimated the other day, that I think it will be found extremely difficult indeed to sustain the leases.

I will now state, in a few words, the view which I have taken of the other cases, and the propositions which I shall have the honour of making with respect to them. With respect to the lease of Harestanes, in which case the Trustees of the late Duke of Queensberry, and Alexander Welsh, the tenant, were appellants, and the Earl of Wemyss respondent ; that is a case which brings into question the validity of grassums, and is also to be determined upon other circumstances ; and among others, the circumstance that the tack is for fifty-seven years. Conceiving that that tack of fifty-seven years is an

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Harestanes
for 57 years
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ation.

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alienation within the meaning of the entail, it will not be necessary for me, in my view of the case, to say more as to this case, than to propose to affirm the interlocutors complained of:

With respect to the case of Symington, who is the tenant of the farm of Edstoun, it is a case which had an alternative ish, and it might have been necessary to reconsider that case, because it is case affected by that circumstance. But it may be disposed of upon other grounds*.

In the case of the appeal of the Duke of Buccleuch against the Executors of the deceased William Duke of Queensberry, I propose to reverse the interlocutor of the 7th March 1816, and to find, that the late Duke of Queensberry had not power, by the entail under which he held the land, to grant tacks for terms of years, partly for yearly rent and partly for a price or sum paid to the Duke himself; and that tacks granted by him, upon surrender of former tacks which had been granted partly for yearly rent and partly for prices or sums paid to the Duke himself, ought to be considered as partly granted for prices or sums paid to the Duke, and that such tacks ought not to be considered as let without diminution of the rental, or at the just avail, and are therefore to be considered, as between the parties claiming under the entail, as tacks which he had not power to grant by such entail; and with that finding, to remit the cause back to the Court of Session in Scotland, to do therein as shall be just and consistent with this finding.

Tenant of
tailzie in pos-
session.

* See the minutes of the judgment. *Vide post*, p. 533.

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In the case of the Duke of Buccleuch against the Executors of the late Duke of Queensberry, and Hyslop, the tenant of Halscar, I propose, to reverse the interlocutor complained of in the appeal, and to find that the late Duke of Queensberry had not power by the deed of entail to grant the tack in question, the same having been granted upon the surrender or renunciation of a former tack then unexpired, and which former tack had been granted by the Duke at the same rent, and also for a sum or price received by him; and that the said tack having been granted, partly in consideration of the rent reserved thereby, and partly in consideration of a price or sum before paid to the Duke himself, and of the renunciation of the said former tack, therefore to find that the tack in question ought to be considered, in this question with Hyslop the tenant, as let with an evident diminution of rental, and not for the just avail; and with this finding, that the cause be remitted back to the Court of Session in Scotland, to do therein as is just and consistent with this finding.

With respect to the Whiteside case, I propose to find, that William late Duke of Queensberry had not power, under the entail, to let tacks, partly for annualrent and partly for sums and prices paid to himself; and that tacks granted upon the resignation of former tacks, which were granted partly for rent reserved and partly for sums and prices paid to the Duke himself, are to be considered as tacks made partly for rent reserved and partly for sums and prices paid to the

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Duke himself; and that the tacks in question having been granted partly for rent reserved and partly for a sum or price paid to the Duke for a former tack renounced, for which a sum or price had been paid besides the rent reserved—the same is to be considered, as between the persons claiming under the entail, as a tack, partly for rent and partly for a sum or price paid to himself, and ought not to be considered, in a question with the tenants claiming under the said tack, as let without evident diminution of the rental; and with this finding, to remit the cause to the Court of Session, to do as it should deem just, consistent with this finding.

With respect to Edstoun, to adjudge precisely in the same terms as I have just proposed as to the Whiteside case.

The only other cases are those which relate to Crook and Flemington. I propose to your Lordships to remit to the Court of Session the interlocutors in both those cases to be reconsidered.

See the minutes, *post*.

THE orders and judgments of the House in the several cases were according to the opinions and proposals of the Lord Chancellor *.

* The Lord Chancellor concluded by saying, that he had never been able to look at these cases without being satisfied, that in whatever way they were determined, it would be absolutely necessary for the stability and security of titles to property in Scotland, that some Act of Parliament should be passed.

The *Earl of Lauderdale* observed, that after this judgment, a declarator would lie against any heir of tailzie who took a grassum; and that being the case, this judgment would give rise to

LORD REDESDALE *.

MY LORDS,

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THERE are two entails now under consideration, applying to different estates, and with different limitations : One of them applicable to the MARCH and NEIDPATH estate, with respect to which the Earl of Wemyss is the person contesting, with the Trustees of the late Duke of Queensberry and the tenants, the validity of leases granted by the Duke ; the other, applicable to what is called the QUEENSBERRY estate, in which the question is between the Trustees of the late Duke of Queensberry and the Duke of Buccleuch, upon a proceeding somewhat of a different description from that in the former case, for the purpose of obtaining a declaration, that all the leases expressed in the proceedings to have been granted by the late Duke of Queensberry, of the Queensberry estate, have been granted according to the power vested in him by the entail of that estate. There is also this distinction betwixt the two cases. With

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facts, plead-
ings and
questions.

such a scene of litigation as absolutely to require an Act of Parliament to be brought in to declare what is the law.

The *Lord Chancellor* replied, that the proposition which he intended to make, would bring before the House that consideration ; and he hoped, whenever that matter should be brought before the House, the peers would express more fully their opinions upon that subject.

* This speech was delivered before the conclusion of that of the Lord Chancellor, but it has been thought preferable to preserve the connexion of the Lord Chancellor's judicial opinion by postponing these observations of Lord Redesdale.

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respect to the March and Neidpath estate, it is not contended that the leases which are now in question, were authorized by any power contained in the deed of entail ; for the leases which have been granted are not either for the granter's life, or the life of the receiver, which is the only species of lease expressly referred to in the settlement of the March and Neidpath estate. With respect to the Queensberry estate, the leases are of a different description ; because, supposing the word "*dispone*," in the entail of the Queensberry estate, to have the same effect as the word "*alien*," the leases impeached are sought to be supported under a power of leasing, which is contained in the settlement of that estate.

Remit.

The *form* of the action which has been brought by the Trustees of the late Duke of Queensberry against the Duke of Buccleuch, to have this great number of leases declared to be good, was a subject of consideration of your Lordships when this case was before your Lordships upon a former occasion ; and your Lordships directed the cause to be remitted* back to the Court of Session in Scotland, to review generally the interlocutor complained of in the appeal then depending ; and special directions were given as to the points to be reconsidered upon such review.

Interlocutor
consequent
upon the
remit.

Upon this remit the Court to whom it was made have pronounced an interlocutor repelling the defences, and finding, decerning, and declaring, *in*

* Lord Redesdale here recited the words of the remit, which are given before, p. 387.

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terms of the original libel. The *terms of the original libel* required an unqualified declaration in favour of all the leases in question. It would have been to me somewhat satisfactory, if the Lords of Session had thought fit to express that they had considered the several subjects respectively to which their attention was particularly called by the remit, and had expressed that they had so done, in the decision which they have made upon the subject. At present, we are only enabled to form a judgment how far they took the particular subjects into their consideration, in consequence of the notes with which we have been furnished, importing to be notes of what fell from the Lords of Session respectively.

Upon those notes I feel myself compelled to state, that, as far as I can form any judgment, the Lords of Session have totally mistaken the object of the remit in one point—that object not being to obtain the opinions of the Lords of Session, whether, generally, an action of declarator respecting the validity of the leases could be entertained; but whether by the persons, and under the particular circumstances which are mentioned in the remit, such action could be entertained? Upon that subject the Lords of Session have given to your Lordships no satisfaction whatever. It appears to me strange, that these learned Lords should have so mistaken the terms of the remit; but, perhaps, it was much easier to mistake the terms of the remit, than to grapple with all the difficulties which the terms of the remit, not mistaken, might have imposed. We must, however, now deal with the decision such as it is. I cannot forbear

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on the opinions
expressed by
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observing also upon the language used in some of the memorials upon the subject, with respect to what may have fallen from Noble Lords in this House. There is a style and a manner which are becoming upon such a subject ; and I will only say at present, that I cannot apply *that* word to all that is to be found in some of these memorials.—I trust, my Lords, that the practice will not be continued.

Questions
upon the
leases.

With respect to the leases themselves.—In the Neidpath case, the first question which occurs, arises upon the length of the term which has been granted. It seems to be a very serious question, To what extent that can be carried ? There is another case* upon your Lordships table, in which the question is, Whether a lease of 999 years may be granted of an entailed estate. I leave your Lordships to consider what may be the effect of leases for 999 years of an entailed estate. Your Lordships will recollect, that during that term of 999 years, the estate will nominally belong to one person, and really to another ; that the consequence will be, that the power and influence of such property will be divided—divided, in a greater or less extent, according to the possible improvement of the property, or the difference in the value of money, from time to time ; and at length, the lessee for 999 years may have an infinitely better property than the tenant who succeeds to the entailed estate, and the power and influence arising from the estate will be wholly in the lessee, and the tenant of the

* The Elgin case, since decided in favour of the lease, on the words of the permissive clause of the entail. *Vide ante*, p. 412.

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LEASES.Impolicy of
long leases,
and leases re-
newable for
ever.

tailzie will be a mere annuitant. One of the greatest evils affecting another part of the united kingdom, arises out of the leases renewable for ever, which have been granted in that country, where leases for 999 years have also been granted, to a great extent. Knowing all the political evils which have resulted from that practice, I take it upon me to say, that if a lease for 999 years can be granted of an entailed estate in Scotland, the consequences to the country would be infinitely worse than any which can result from the strictness of any Scotch entail. When, however, Judges in a Court of Justice take upon themselves to act upon what they conceive political evils, or political benefits; and when they hold that entails are odious, from political considerations, which is the only ground I know of upon which it can be contended that entails are odious; they should consider, whether, in endeavouring to defeat entails in this manner, they are not producing a greater political evil than that which they are attempting to avoid. But I do not understand what right a Court of Justice has to entertain an opinion of a positive law, upon any ground of political expediency. I have always been at a loss to conceive upon what ground a Court of Justice was entitled so to act. The *Legislature* is to decide upon political expediency; and if it has made a law which is not politically expedient, the proper way of disposing of that law is by an act of the Legislature, and not by the decision of a Court of Justice. It is true, my Lords, that in this part of the country, in very ancient times, contrivances have been resorted to to avoid the effect of a statute, also a very ancient statute, by which entails were counte-

Expedience
an improper
ground of
decision.Entails in
England de-
stroyed by
judicial con-
trivance.

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An anomaly
countenanced
by the legis-
lature and
sanctioned by
time.

Distinction
between Eng-
lish and Scotch
entails.

nanced—I mean the statute *DE DONIS*. This has been done gradually, and by various contrivances, and with some assistance too from the Legislature. The prejudices of those who conceived themselves interested to preserve entails, not admitting of a complete repeal of the statute *de donis*, it has been, in effect, partially repealed by such contrivances, and these contrivances have been in some degree countenanced by the Legislature. The effect of these contrivances has now been so long considered as established law, that it cannot now be questioned. We might almost as well question the constitution of the Legislature itself. Lately, it has been my duty particularly to consider that subject also, and I fear, your Lordships will be unable to find by what law a considerable part of the constitution of the Legislature of this country has been formed. It has been the work of time, and has been sanctioned by length of time; and length of time has given sanctity to the practice of barring entails in England.

The learned Judges of the Court of Session in Scotland seem to have supposed that those who attend the decision of appeals in this House, are disposed to judge of entails in Scotland according to the law affecting estates-tail in England; and that they consider estates-tail in Scotland as similar to estates-tail in England. On the contrary, it seems to me impossible to assimilate the laws of the two countries on this subject. In contemplation of the law of England, as it now stands, a tenant in tail has a *quasi* perpetual inheritance; he has powers; which certainly do not belong to a tenant of a tailzied estate in Scotland—I mean a

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tailzied property, protected with all the clauses necessary for that purpose. The tenant in tail in England, if adult, is capable of rendering himself complete master of the land, and making himself tenant in fee-simple, unless it is an estate held under grants of the Crown of a particular description, where the reversion is in the Crown, and estates-tail, generally, where the reversion is in the Crown. In the latter case, a tenant in tail may bar all but the Crown, though he cannot bar the right of the Crown. A tenant in tail in England, who is an adult, being capable of barring the entail, is not bound to keep down the interest of a mortgage affecting the estate out of the rents of the estate ; but with respect to an infant tenant in tail, the rule is otherwise, for an obvious reason, that in consequence of his infancy, he is not capable of making an absolute disposition of the estate, and therefore it is considered that those who receive the rents for him, are bound to keep down the interest during his infancy. A tenant in tail in England grants a lease, and does not bar the entail. The lease is not void, but it is voidable. If he grants a lease with warranty, and there are assets descending to the heir of entail, the lease is good ; because the warranty will bind the heir of entail, if there are assets to answer that warranty ;—if he grants a lease with a covenant binding the heir of entail, and there are assets descending to the heir to answer that covenant, the heir of entail is so far bound, as to be compellable to make recompence for the breach of covenant out of those assets. Therefore it is, as I conceive, that a lease by a tenant in tail in England

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is not absolutely void, but voidable at the election of the heir, and that it will probably be avoided or not by the heir, according to circumstances. The difference, therefore, between the condition of a tenant in tail in England and an heir of entail in Scotland, is such, that I do not apprehend that any person who has been conversant with the law of England is likely to fall into any of that confusion, as to the nature of estates-tail in England, and the nature of tailzies in Scotland, which the learned Judges of the Court of Session in Scotland seem to have supposed.

It is a very difficult task, unquestionably, for persons who are not familiar with the administration of the law of any country, to apply their minds so fully and effectually to the subject, as those who are familiar with it. No person can feel that more strongly than myself. Having been for twelve months only in the situation of Speaker of the other House of Parliament, and therefore absent from Courts of Justice, I certainly did not find myself, when I returned again to a judicial situation, so capable of applying my mind to the subject as I should have been, if there had been no interval between my following the profession at the Bar, and my holding the situation of Chancellor of Ireland. I have heard that one of the most able men who ever sat in the Court of Chancery in this country, (Lord Cowper,) having ceased for four years to be Chancellor, in consequence of a change in the Administration, when he afterwards came back to the office of Chancellor, often declared that he did not feel himself so ready in the discharge of his duty in that office as he had been before. Whenever, there-

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fore, I judge of a case of Scotch law, (being bound, nevertheless, by the situation in which I stand, to form a judgment upon it as well as I can, and as every one of your Lordships is bound), I always have a jealousy of myself upon the subject, and always endeavour most particularly to divest myself of any thing that can be called English prejudice. I hold that to be a most imperious duty, because I must admit that it is likely such prejudices should exist in my mind. But if I am to discharge my duty as a Lord of Parliament, in giving my opinion upon cases of appeal which come before this House, as long as the Court of Appeal shall remain in this House, (and most of your Lordships must be in some degree at least in the same situation), I must endeavour to make up my mind upon the subject in question as well as I can, and to give the best judgment I can form upon it.

In judging of any question of law, it has always appeared to me highly important to discover, in the *first* place, what are the principles upon which persons who have had to decide upon the same question of law have proceeded; because I do not apprehend that a Court of Judicature is to decide capriciously, or is to decide because it will have it so, or as has been said with respect to the Court of Chancery, facetiously, by a very learned person, Mr. Selden, that a judgment in the Court of Chancery was like taking measure of the Chancellor's foot, one Chancellor having a *long* foot, and another a *short* one. The object of every person in a judicial situation, and particularly of a person in the office of the noble Lord on the Woolsack, should be, and I conceive always has been, to establish certain principles,

The principle
of former de-
cisions to be
regarded.

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Long leases
held to be
alienations.

by which, not only he shall guide his own decisions but by which others may decide similar cases, and by which those who have to give advice on similar cases may be able to give proper advice. For if principles of decision are not established, it is impossible to say what will be the decision upon any case, or what advice ought to be given by those who are consulted on the subject. I have therefore been most anxious to discover what are the principles of decision which the Courts in Scotland have adopted in deciding upon the powers of tenants of tailzied estates in Scotland under strict entails. With respect particularly to their power of granting leases, (for that is the subject which is immediately under your Lordships consideration), I find, that it has been generally considered that a lease of a long duration is a species of alienation; and your Lordships have accordingly decided, in the Wakefield case, that a lease of ninety-seven years was a species of alienation, not permitted to a person who held an estate under strict entail; and that a prohibition of alienating prohibited such leases. It immediately occurred to me, to endeavour to discover upon what principle this was so determined. The principle, and the *only* principle which I have been able to discover, is this,—that the prohibition to alienate extends, generally, to any lease, the lease being, in itself, an alienation *pro tanto*, during the continuance of that lease, except so far as a rent is reserved upon that lease, payable during its continuance. I then proceeded to consider upon what ground any lease by a person holding under a strict entail, could be good against the successors in that

entail ; and according to what has fallen, from time to time, from Judges in Scotland, and what is to be found in text-writers on the subject, the rule is this, —that a lease of a proper duration, and under certain circumstances, is to be considered as a fair administration of the estate, which it is necessary to allow to a person holding a tailzied estate, for the purpose of giving to him the fair benefit of the estate during his right to the enjoyment of it ; because if he were utterly incapable of letting any lease whatsoever, the consequence would be, that he must either hold the property, however large it might be, entirely in his own possession, (a thing, in many cases, almost impossible), or he must dispose of the possession of it to persons whose interest would terminate with his life. That inconvenience, therefore, seems to have been considered as a sufficient ground for allowing some, but it may be difficult to say what power of disposition by leasing, to a tenant of a tailzied estate in Scotland. The language of all the persons who have spoken, and of all the persons who have written upon the subject, has been, that they considered the granting of leases by a person under the restriction of a tailzie, as a due administration of the estate, and a species of administration which was necessary for the enjoyment of the estate.

It seems to me, that a power thus yielded to necessity, and yielded *only* to necessity, ought to be bounded by the necessity which compels it to be yielded ; — that is, by that which, generally speaking, is compatible with the future as well as with the present enjoyment of the estate. The future possession of the estate might be injured,

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The power of the tenant of tailzie in possession ought to be bounded by this necessity.

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if the land were let without the means of insuring the proper management of it, in consequence of the lessee not having a certain term and interest, and particularly in a country in the state in which the greatest part of Scotland was a hundred years ago. Where a country was capable of great improvement, it would have been highly injurious to have prevented persons, holding estates under strict entail, from granting any leases whatever, that should endure beyond their own interest in those estates. The limitation which I have stated seems to me to be one which necessarily arises from the principle on which, as I conceive, an indulgence in making leases to bind the successor has been allowed to tenants in tail; and that the grant of a lease, for what may be deemed a long term, (whatever may be the length of term that may be allowed), is not permitted to a person holding an estate strictly entailed, being prohibited by the prohibition of alienation; the alienation by lease being prohibited where the extent of the term granted is beyond that which was necessary for the proper administration of the estate. When I am asked, what is to be the limitation of a lease under such circumstances, I confess there is a great difficulty in drawing any line precisely; but if there is to be no limitation, it is perfectly clear that the property may be, in effect, alienated; and when it has been decided that a long lease may be an alienation, as in the Wakefield case, it appears to me perfectly clear, that you must consider the question upon every lease to be, whether that which has been done is alienation or administration, according to circumstances.

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Harestanes:
question as
to duration.

In judging, therefore, of the Neidpath case, the first question to be considered is the length of duration of the lease of Harestanes, which is a fifty-seven years lease, not qualified by any circumstances ; not for instance, a building lease. Was it, or was it not necessary to the administration of the estate, that a fifty-seven years lease should be granted ? What line is to drawn between fifty-seven years and ninety-seven years ? A ninety-seven years lease your Lordships have determined to be not sustainable, on account of the length of time ; a fifty-seven years lease is a lease that may, probably, endure much beyond the life of the granter. It may be made by a person at a very advanced period of life : his immediate successor, (his son perhaps) may also be at an advanced period of life ; and a fifty-seven years lease in such case likely to endure during the whole time of the successor's holding. If it should so endure, what is the consequence ? The administration of the estate during the time of the succeeding tenant in tail, is not in the hands of that tenant in tail ; it has been pre-occupied by the person who preceded him in the enjoyment of the estate. The consequence necessarily is, that the person who so succeeds under the tailzie, has not the same power of administration as the person who preceded him had ; and, generally speaking, has no chance of having the same power, considering the ordinary term of human life. We are told, that threescore years and ten is the ordinary term of human life ; and if threescore years and ten *be* the ordinary term, consider how large a portion of that ordinary term a lease of fifty-seven years will occupy ; and what is the probable state of a succeeding heir of

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Lease of
Harestanes
bad in length
of time alone.

Question of
grassum.

Grassum is
rent paid in
advance to the
granter of the
lease, instead
of being paid
annually to the
owner of the
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time being.

entail coming to the possession of the estate under a lease of fifty-seven years, granted in the latter years of his predecessor. That consideration also called to my attention the leases with covenants to renew ; for, if a man may grant leases for fifty-seven years, and may covenant to renew those leases for fifty-seven years, yearly, as long as he lives, what is likely to be the situation of the succeeding heir of tailzie, if that covenant should be acted upon ? Has the successor, generally speaking, any chance whatever of having the administration of the estate in any degree ? It appears to me, that, considering the case upon no other ground but the length of time, the lease of Harestanes is one that cannot be supported upon any principle upon which I have heard it asserted, that an heir of tailzie, who is prohibited from alienating, and who has not a power to grant leases expressly given to him, can grant a lease ; and upon that ground alone, I should be of opinion that that lease is capable of impeachment. But there is upon that case another consideration, which is, the question of grassum. I cannot understand what the Lords of Session in Scotland conceive grassum to be. In my mind, grassum, as taken on the leases in question, is nothing more nor less than anticipation of rent—it is taking rent beforehand. A noble Lord, whom I see in his place, will recollect the common expression in Ireland, of *fining down the rent*. What is a grassum but fining down the rent ? Is there any distinction ? I can find none. Then, if grassum is fining down the rent, what is grassum but rent ? rent paid beforehand to the granter of the lease, instead of being paid annually to whoever should be

owner of the estate. But the objection which I state does not depend upon this reasoning alone: the Courts in Scotland have determined that grassum is rent; they have determined that it is rent with respect to teinds, and with respect to superiors; and in all cases, except in the case of tailzied estates, grassum is admitted to be rent. Such have been the decisions of the Courts in Scotland. Now, what can be the distinction between the same thing with respect to an heir of tailzie, and with respect to other persons? When an heir of tailzie in possession receives a sum of money on granting a lease, for what does he receive it? He receives it, because the rent reserved upon the lease which he grants, is so much less than the value of the land. Grassum would not be given to him, unless the land was let by the lease at an under rate. It is therefore neither more nor less than rent received by anticipation, and received by one heir, instead of being received by a succession of heirs. In the Westshiells case, a very extraordinary distinction was attempted to be made. The Court of Session held, that though what was granted by the name of grassum was not rent, yet what was given, not by the name of grassum, but in the shape of bonds for the payment of money at future periods, was rent. It appears to me that both were the same thing. What difference is there betwixt my receiving, upon my granting a lease, 100*l.* or my receiving 100*l.* in ten years, at the rate of 10*l.* a year, with interest? Therefore, in the Westshiells case it appears to me, that the bonds which it was determined should go to the succeeding heir of entail as rent, were just the same thing as the grassum taken in the

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The Courts of Scotland have decided that grassum is to be considered as rent in questions of teinds and superiorities, and in all cases except of tailzied estates; but there is no ground for the exception.

Decision in
Westshiells
case.

Groundless
distinction
between pre-
mium paid and
premium
secured by
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same lease. I cannot distinguish between the two. In that case no question was made with respect to the *grassum* ; and I believe there were reasons why the person who claimed the benefit of the bonds did not think fit, either to resort to his father's assets, for the purpose of demanding a proportion of the *grassum*, or to attempt to set aside the leases which had been granted, provided he received the bonds remaining due in lieu of rent. The effect of *grassum* is also to be considered in another point of view, which more particularly relates to the case of the Queensberry estate than to that of the Neidpath estate ; and yet, to a certain degree, it respects the Neidpath estate also, if the opinion that the rent to be reserved upon a lease to be granted by a person in possession of a tailzied estate in Scotland must be the last reserved rent, is well founded. Upon what principle that opinion is founded, I am utterly unable to discover ; for, if nothing is said in the deed of entail upon the subject of rent, I cannot see why the person who is in possession of an entailed estate cannot grant a lease for half the last rent, as well as for the last rent. I can see no just ground of distinction : I see nothing upon which I can found a principle of decision, to make a distinction between these two cases ; and therefore I so far agree with those Lords of Session who held that the tenant of an entailed estate may let down the rent. They must so hold, if they mean to be consistent, where there is no express prohibition to the contrary ; for if the tenant of a tailzied estate has power to grant a lease for any term, where there are no express words in the deed of entail to prohibit it, if there is nothing in the deed

Where there is no prohibition, the tenant of a tailzied estate may lower the rent.

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of entail to prohibit granting for less than the old rent, there is nothing to limit the terms on which the lease may be granted; and consequently to be consistent, those who hold that, where there is no express prohibition, a lease may be granted for any term, must also hold that the rent may be let down, and that the lease may be granted at any rent. Most of the Lords of Session, however, are of opinion, that the old rent must be reserved; and a very distinguished person, whose sentiments upon that subject have been read by the noble and learned Lord, seems to have conceived that there can be no question but that the old rent must be reserved. But upon what principle? I can see none. If a person who is in possession of an entailed estate can defeat his successor, by granting a lease upon a grassum, I can see no ground for holding that the rent reserved must be the *old* rent, or that it may not be any rent however small. But, if the lease is granted upon a grassum, and the old rent is nominally reserved, is the rent so reserved in effect really and truly the old rent? Does it produce the same thing? Certainly not. Your Lordships know, from what has been stated in the case of the Queensberry estate, the effect of the grassums taken, and the consequent burdens brought upon the estate, if with respect to to others, grassum is to be considered as rent; but, between the Duke of Buccleuch and the late Duke of Queensberry, is it not to be considered as rent, and that, consequently, the net rent now to be received is not the same net rent which was received previous to the leases in question.

Looking at the cases which have been decided, it

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Principles
established in
Leslie v. Orme
decide this
case.

The entail in
that case did
not prohibit
setting tacks
for any dura-
tion of time.

strikes me, that the case of *Leslie v. Orme*, which came before this House during the time Lord Thurlow held the office of Chancellor, has established certain principles upon which I should wish to decide the present case. The case of *Leslie v. Orme* was this: An entail had been created in the year 1692, by a person of the name of Patrick Leslie, by which he disposed of lands in entail, (with the usual words prohibiting alienation,) to his second son George Leslie. The words of prohibition contained in the deed of entail were, “that it should not be lawful
“to the said George Leslie, and the said heirs of
“tailzie, to sell, annailzie, or dispone the lands and
“others, or any part thereof, provided to them,
“heritably or irredeemably, or under reversion, nor
“to grant infestments of annualrent, or yearly feu-
“duties thereof.” There followed in the deed of entail these words: “Nor to let tacks in diminution
“of the true worth and rental they paid before the
“said tack.” This deed of entail therefore generally prohibited alienation, and expressly prohibited, not the setting tacks for any duration of time, but the setting tacks “in diminution of the true worth
“and rental they paid before the said tacks.” A subsequent deed was executed according to the power vested in the party for that purpose, taking notice of the former deed of the 8th November 1692, and reciting, that by that deed it was prohibited, conditioned, and declared, “that it should be nowise
“leisome and lawful, nor in the power of the heirs
“of tailzie therein named, to set tacks of the lands
“therein specified, in diminution of the true worth
“and rental they paid before the said tacks ;” and that

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for the reason stated, he was disposed to change this clause, and that he had power to do so ; and therefore he did, with consent and advice of his son George Leslie, “ dispense with, and annul the “ clause above specified, as freely in all respects as “ if the same had never been conceived or insert in “ the bond of tailzie above deduced : ” the effect of which was, to strike out of the former deed of entail the words prohibiting leases : But these words were added : “ So that, in all time hereafter, it shall be “ leisome and lawful to any of my said heirs of “ tailzie, to grant tacks and assedations on any part “ of the lands contained in the said tailzie, and that “ under the present rental, if they shall think fit “ and expedient, without incurring any hazard or “ danger in and through the foresaid irritant clause, “ which is hereby abrogate and taken away,” Now, my Lords, taking these two instruments together, it seems to me that there is a general prohibition of alienation ; and that there is an express power of granting leases, and of granting those leases without limitation of term, and at any rent, under the present rental. Unless the prohibition of alienation extended to prohibit long leases, there was in these instruments nothing that prohibited long leases ; but it is perfectly clear, that not only the granter of the entail, but the Court of Session, did conceive that there was something prohibiting long leases ; for, when they came to decide upon the leases granted, they declared themselves to be deciding upon the supposition that the person in possession under the deed of tailzie acted in the execution of the power of leasing so granted ; and they expressed

It contained a general prohibition of alienation, and a power to grant leases without limitation of term, and for any rent under the existing rental.

Yet the Court of Session thought in that entail there was something prohibiting long leases.

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this to be their construction of the settlement, in the words of their decision.

The first person who came into possession of the estate under this entail, was a person of the name of Peter Grant, who took the name of Leslie ; and he having had a litigation with respect to his title, was involved in considerable expense ; and a person of the name of Orme, who had been employed by him to direct that business, had considerable demands upon him for money on that account. Part of the property consisted of a house called Fetternear, which had been a *mansion-house*, but at that time was in great decay, and not capable of being inhabited. Mr. Orme obtained a lease, dated the 29th March 1769, of *that part* of the estate for the term of four nineteen years, at the rent which had been before reserved upon a former lease. The consideration for this lease was part of the debt due to Orme ; and the remainder of that debt was to be satisfied by means of another instrument, enabling Orme to withhold a part of the rent reserved by the lease till the whole of that debt should be discharged. Orme also obtained other instruments after mentioned from Mr. Leslie Grant. At length, the property comprised in the entail came into the hands of the person who disputed the lease, and sought to reduce all the instruments obtained by Orme from Leslie Grant, as contrary to the powers which were vested in Leslie Grant by the deed of entail ; and he likewise endeavoured to reduce them, upon the ground of frauds practised upon Leslie Grant by Orme. The question of fraud was a distinct question, and it was determined that it was not compe-

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tent to the person who then sought to investigate the transactions, to impeach them on this ground ; and the question which finally came before the Court was upon the effect of the instruments executed by Mr. Leslie Grant. The Lord Ordinary, in his interlocutor, found, with respect to the tack dated 29th March 1769, whereby Leslie Grant, in consideration of the sum of 992 l. 15 s. 6 $\frac{1}{4}$ d. sterling of premium or entry-money, discounted and allowed to him out of a larger sum due by him to Orme, conform to accounts settled between them, set in lease the lands and baronies of Balquhain and Fetternear to Orme, for the space of four nineteen years, from and after the term of Whitsunday 1769, for a rent or tack-duty of 9,062 l. 8 s. 3 d. Scots : That as by the two deeds of entail, the heirs of entail were put under no restriction as to the number of years for which leases might be granted, they were at liberty to graut leases for any term of years they thought proper, and therefore sustained the defence, and assoilzied the defender from the reduction of his tack, in so far as challenged on account of its being granted for such an unusual term of years, “ seventy-six years ;” and in so far as this tack was challenged on account of its being granted for a rent or tack-duty *below what the lands and estate were worth, and did or might have paid.* The Lord Ordinary found, that though, by the tailzie of said estate, in 1692, the heirs of entail were restrained from setting tacks in diminution of the true worth and rental they paid before the said tacks, as the entailor by another deed in 1707 did dispense with and annul that clause, sicklike and as freely as if the

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same had never been conceived nor insert in the bond of tailzie; declaring the same to be void and null in all time coming, so that in all time thereafter it should be leisome and lawful to any of the said heirs of tailzie to grant tacks of any of the lands, and that under the present rental, if they should think fit and expedient, without incurring any hazard or danger in and through the aforesaid irritant clause, which was thereby abrogate and taken away. The Lord Ordinary then "found that the tack in "1769 was not liable to challenge by the pursuer as "granted for an under rent or tack-duty; and "*separatim* found, that the said tack-duty of "9,062 *l.* 8 *s.* 3 *d.* with the discount given of "992 *l.* 15 *s.* 6½ *d.* sterling, in name of premium or "grassum, was superior to any rent these lands did "then pay or had formerly paid, and therefore upon "that ground also sustained the defence, and assoil-
"zied the defender from the reduction of that tack."

Construction
of the words
"true worth
and rental."

The latter part of this finding shows, that at the time of that decision, there was not so perfectly clear an opinion of what was the construction of the words "the true worth or rental," contained in the first deed of entail, as is now alleged; and the pursuer had attempted to impeach the lease, as granted for a rent or tack-duty below what the estate and lands were worth, and did or might have paid. The third deed under challenge, was an obligation and assignation of even date with the tack thus granted by Leslie Grant to Orme, whereby, for the causes therein expressed, Leslie Grant assigned to Orme, his heirs, &c. for his own behoof and that of the other creditors of Leslie Grant, therein mentioned, the

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sum of 4,470 *l.* 1 *s.* 9 *d.* Scots, being the balance of the above tack-duty over and above 3,600 *l.* reserved to Leslie Grant; this instrument containing a discharge of the said 4,470 *l.* 1 *s.* 9 *d.* of the said tack-duty, until such time as the debts above mentioned should be satisfied; and with this proviso, that in case any of the heirs of tailzie should refuse to ratify these his deeds, the aforesaid tack-duty of 9,062 *l.* 8 *s.* 3 *d.* Scots should be restricted to 3,600 *l.* until the aforesaid debts should be paid. Upon this the Lord Ordinary found, that the assignment and restriction of the tack-duty, for the purposes therein mentioned, viz. for payment of the debts contracted by Leslie Grant, who held the estate under the foresaid entail prohibiting the contracting of debts, the restriction of the tack-duty, and the assignment of the surplus of the tack-duties to Orme in payment and satisfaction of the debts due to him and the other creditors mentioned in the deed, could not be effectual beyond the life of Leslie Grant, and such of the other heirs of entail as should ratify and confirm the same; and as it was accordingly ratified and confirmed by the pursuer's father, the Lord Ordinary sustained the defence, and assoilzied the defender from the reduction of the said deed, so far as respected the restriction of the tack-duty and assignment of the surplus over and above the 3,600 *l.* during the lifetime of Leslie Grant and of the pursuer's father; but reduced the same, so far as regarded the restriction and assignment of the tack-duty from and after the death of the pursuer's father, and reduced the same accordingly. The reducing the rent for the purpose of paying

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debts was not within the power of leasing which had been granted, and was a mode of charging the estate with those debts, which was expressly restrained by the deed of entail; and yet Leslie Grant might have done the very same thing in another way, if he might have granted a lease at a less rent, instead of granting it for the larger rent, and thus might have given the benefit of the depression of the rent, to the extent in which a benefit was intended to be given by this deed, which was found not to be according to the powers which he had. I mention this, particularly with this view, that it is perfectly clear that the Court of Session, at that time, did not consider that what a man might have done in one way, he therefore could do in another. The interlocutor farther noticed, that the tack of the 29th of March 1769, reserved to Leslie Grant, his heirs and assigns, a faculty or privilege to resume the possession of *the mansion-house, offices, and gardens*, and mains of Fetternear, upon twelve months premonition, upon an abatement from the tack-duty of 430*l.* 4*s.* 10*d.* Scots, but that that reservation had by deed in August 1769 been discharged and annulled, so far as respected assigns, and was, by deed of the 7th September 1773, again restricted and limited to Leslie Grant himself, and the heirs male of his body. Upon this the Lord Ordinary found, that as the said Leslie Grant was under no restraint or limitation from granting tacks of all or any parts of the said estate, and for such rent or tack-duty as he thought proper, there laid no challenge at the pursuer's instance, either of the tacks themselves, as comprehending what was denominated the mansion-

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house, offices, &c. of Fetternear, or restriction of the aforesaid reserved faculty to the exclusion of the heirs and assignees of Leslie Grant, other than the heirs male of his body, and therefore assoilzied the defender from the reduction of the several restrictions of the said faculty. The Lord Ordinary then, after noticing that the pursuer insisted that the unlimited power of granting tacks, for any number of years, without limitation, ought not to comprehend the mansion-house, offices, &c. of Fetternear, as being the principal mansion-house of the family, found that there was *no evidence that it was the mansion-house of the family*, or had been occupied and possessed as such, for many years before, but was, in a great measure, ruinous and waste, and as the tailzie itself made no such exception, repelled that reason of reduction. The last deed under challenge, was a tack or contract 11th September 1773, whereby Leslie Grant did, for the causes and considerations therein mentioned, not only ratify the aforesaid tacks, but prorogated the same for the further term of nineteen years, upon receiving payment of a premium or grassum of 25 *l.* sterling, and the Lord Ordinary sustained the defence against the reduction of this tack, and assoilzied the defender. The case afterwards came before the Lords of Session, and the Court so far differed from the Lord Ordinary, that they sustained the reasons of reduction of the deed of restriction granted by Peter Leslie Grant to Orme, dated the 5th day of August 1769, and of the deed of restriction and tack granted by Peter Leslie Grant to Orme, dated 7th of September 1773, and also of the tack granted by the said Peter Leslie

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Grant to Orme, dated the 11th of September 1773 ; and remitted to the Lord Ordinary to proceed accordingly. The Lords of Session, therefore, agreed with the Lord Ordinary with respect to the power of granting leases at any rent, and without any restriction as to the term, under the words contained in the second deed of entail, but held that, notwithstanding the terms of that power, and although that power was granted in general words, extending to all the estate, without any exception of the mansion-house, the mansion-house and lands could not properly be considered within the terms of that power, because they were the mansion-house and residence of the family, the Lords finding that Fetternear was a mansion-house, against the finding of the Lord Ordinary. They also considered the subsequent lease, by which an additional term of years was added to the first term of four nineteen years, as not within the power ; and the decision of the Court of Session was affirmed, on appeal, by this House.

Decision of
the Court of
Session affirm-
ed on appeal
in D. P.

Leases in
Leslie v. Orme
held good by
virtue of the
power, though
otherwise
prohibited.

I conceive, therefore, that in this case of *Leslie v. Orme*, the Court of Session, and this House affirming what was done by the Court of Session, have established by their decision, as far as that decision has any authority, that the lease in question, in the case of *Leslie v. Orme*, was to be sustained under the express power given by the deeds of entail ; and that, therefore, it was to be in all respects in conformity with that power ; that it was the express power under that settlement which enabled Leslie Grant to grant a lease of that long endurance, and at the rent reserved, and to take the grassum which he did take. I cannot conceive how there could

otherwise be a question with respect to the lease which was sustained. If Leslie Grant could have made that lease, though every thing had been thrown out of the entail which expressly gave that power, would first the Lord Ordinary, and then the Court of Session, have expressly sustained the lease as good by force of the power, the Court of Session, in construing that power, holding by implication, contrary to the express words, that the mansion-house, and the lands adjoining it, were not within that power. Under these circumstances, therefore, I conceive that the case of *Leslie v. Orme* tends to show that that which is now said to have been the old law of Scotland, was not considered as the law at that time. It seems also clear, that the power which an heir of tailzie has to grant leases, so far as he has that power, is subject to the exception with respect to the mansion-house, and the lands which belong to it; an exception which indeed is pretty generally admitted. That exception was understood both by the Lord Ordinary and the Court of Session; for though the Lord Ordinary did not determine, as the Court afterwards did, with respect to the house and land, it appears that he considered the house as not the mansion-house, but waste, though he also relied on the general words in the power, including all the estate without exception. The Court, on the contrary, considered that Fetternear was properly the mansion-house of the estate, and therefore not properly comprised within the leasing power, notwithstanding the words of that power, which extended to the whole property. The result appears to be, that it was then understood that an heir of tailzie cannot grant a lease of the entailed

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The mansion
and lands ad-
joining held
not to be
within the
power, though
general.

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Lease of a
mansion ex-
cepted because
not necessary
for the enjoy-
ment of the
property.

mansion-house and lands occupied with it, but that they shall be reserved for the use of the next heir of tailzie, when he comes to the enjoyment of the estate.

Upon what principle can that have been determined ?

It can only have been determined upon *this* principle, that the heir of tailzie who is in possession has generally no right to grant a lease but for the purposes of his own enjoyment of the property ; and therefore he has no right to grant the mansion-house, because that is not necessary for his enjoyment of the property, according to the view of the creator of the entail, who is supposed to have intended that the person in possession, as heir of tailzie, should have the mansion-house, and the lands belonging to it, for his own occupation. This appears to me to show decisively what is the principle upon which any lease by the heir of entail must stand, unless granted under an express power ; for I cannot imagine on what ground the mansion-house and the lands adjoining it are excepted from the general power of leasing attributed to the tenant in possession of an entailed estate, without any express words for the purpose, unless the power of leasing is to be considered as arising from the necessity of leasing for the purpose of enjoyment, and therefore not extending beyond that necessity. For what reason was it determined in *Leslie v. Orme*, that the lease for four nineteen years was not a lease struck at by the prohibition of alienation ? because the power of leasing given to the tenant in tail, gave him a right to grant a lease at any rent he pleased ; and if the lease was *good* at any rent he pleased, the reason for avoiding the lease, on the ground of alienation, did not apply.

With respect to the case of the Queensberry estate,

in which the Duke of Buccleuch is the person complaining to your Lordships, the word "alien" is not contained in the deed of entail, but the prohibition uses only the word "dispone;" and the question is, Whether the word "dispone" is equally effectual for the purpose as the word "alien?" I will not trouble your Lordships by going through all that is to be found in Acts of Parliament, and in text-writers, upon the effect of the word "dispone." It appears to me, that it is fully equivalent to the word "alien," and that, in this very settlement of the Queensberry estate, it is unquestionably used, as already stated by the noble and learned Lord, as equivalent to the word "alien." Upon that subject, I am relieved from difficulty by the opinions of the Lords of Session, because a great majority are of opinion, that the word "dispone" has in this deed of entail the same effect.

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pone" the
same in use
and effect as
the word
"alien."

The next consideration respects the alternative leases;—the leases which are to endure for so many years, if such be the power, and so on, till reduced to nineteen years. It appears to me, that such a letting of an estate cannot be deemed a proper administration; for how is the person who succeeds to the estate tail to ascertain for what term the lease is to endure? By the terms of the lease, the endurance is to be, *first*, decided by the Court of Session, and, *lastly*, by this House. In the mean time, what is to become of the rent? How is the property to be managed? How is the rent to be paid? Upon a lease which is to bind the succeeding heir of entail, that succeeding heir of entail ought to know immediately to what extent he is bound;

Alternative
leases not a
proper admin-
istration of
the estate, and
void because
term not cer-
tain.

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LEASES.

he ought to have the power to go immediately to the person who is the tenant, and say,—“Give me “the rent reserved by that lease.” But the succeeding heir of entail under these leases must wait until the decision by the Court of Session, or by this House, shall have ascertained their validity and extent, or he must receive under some convention between the parties, or under a protest, to avoid affirming the leases; and until such decision, he cannot know to what extent he is bound by the leases. Is *that* the state in which the succeeding heir of entail is to be placed? And can *that* be deemed a *legal* disposition of the estate, which has such an effect? It appears to me, therefore, that these alternative leases cannot be good, because the term is not certain. What is a lease for a term? A lease must have a certain *ish*, according to the law of Scotland. What is the *certain ish* of these alternative leases? Will any of your Lordships be able to tell me, until this House has decided the case?—Can any of your Lordships say what is the *ish*? Is it a good lease according to the law of Scotland, independent of any other consideration, not having a certain *ish*?

Covenants to
renew.

There is another question which arises upon the covenants to renew, from time to time, by annually granting leases for nineteen years. These covenants to renew have no operation beyond this,—they obliged the person who entered into these covenants, to renew, at the rent agreed upon between the parties, from time to time, during his life, however long the duration of that life might be. Supposing a lease upon a grassum with a covenant of that description by a person of two or three and twenty, who

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might live fifty or sixty years afterwards. The *grassum* to be paid upon such a lease ought to be calculated according to the value of the life of that person, as the lease would be, in effect, a lease for nineteen years, and for as many additional years as the life of that person would probably endure, which, upon the contingencies of lives, is an operation of calculation.

The question of *grassum* is in some respects a distinct question, though it operates both with respect to the alternative leases and the covenant to renew. Question of *grassum*; effect of prohibition to alienate.

The question with respect to *grassum* applying to the Neidpath estate, is a question not depending upon any particular words in the deed of tailzie, but simply upon the right which a tenant in tail has to make leases of the estate tailzied; for although there is a particular power contained in that entail, that power does not apply to any of the leases which have been granted; and consequently the question in the Neidpath case is, What is the effect of the *grassum* upon a lease granted by the tenant of an entailed estate, with respect to whom there is no particular prohibition of granting the lease in question, but where the lease in question can only be affected by the prohibition of alienation? What is the effect of *grassum*? As

a lease is a disposition of the property for a certain period, the effect of taking a *grassum* is, to give to the person who grants the lease a rent for the estate *different* from the rent which the person who succeeds him in the estate will receive during the continuance of that lease. What is “*rental*?” What is “*rent*?”

What is “*grassum*?” *Grassum* is taking, beforehand, that which otherwise would be taken half yearly, or annually, according to the terms Grassum, rental, and rent, the same thing.

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of a lease : It appears to me that "grassum," "rental," "rent," or whatever word may be used, are, in reality, one and the same thing.

The disposition which is contained in such a lease made by a tenant of tailzie, restrained only by words prohibiting alienation, is a disposition of property during the period for which that lease is granted, in which there is a reservation of annual rent, for the benefit of the person who succeeds him ; but that reservation does not convey the same benefit as that which he stipulated for himself. If a lease were granted for nineteen years, or any other term, reserving, for ten years, or so long as the granter should live, 100 *l.* a year ; for the remainder of the term, 10 *l.* a year, I have not heard it asserted that that would be a good lease against a succeeding heir of entail. If a lease is granted at 10 *l.* a year for the whole term, and a grassum is taken equivalent to 90 *l.* a year during the first ten years, what is the difference ? This would be, what was called in the Westshiells case, a contrivance, which, it was said, if dexterously executed, was to be sustained, but if not dexterously executed, was not to be sustained. If therefore the words prohibiting alienation affect any lease granted by the person in possession of the tailzied estate, they must affect a lease which does not reserve to the person who may succeed, the same benefit which the person who granted the lease derived from it, according to the term of his enjoyment of the estate ; because, whatever benefit was so derived from the lease by the person granting it, would be exactly the same thing as the benefit derived from reserving a large rent for the life of the

Words prohibiting alienation, affect a lease which does not reserve to the successor the same benefit as to the granter of the lease.

granter, and reducing it, at the period of his death, for the remainder of the term ; which no person has contended would be a good lease.

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With respect to the Queensberry estate, the words of the entail as to the power of leasing are these :

“ That the said Lord Charles Douglas, nor the other
 “ heirs of tailzie above specified, shall not set tacks
 “ nor rentals of the said lands for any longer space
 “ than the setter’s life, or for nineteen years, and
 “ *that without diminution of the rental, at the least,*
 “ *at the just avail for the time.*” It has been said,
 that this gives a power to let leases at the old rent.
 Under these words, it is not contended that leases
 might be let under the old rent, or that there are no
 words prohibiting the letting under the old rent ; it
 is admitted that the letting must be without diminu-
 tion of the old rent. The first question to be asked
 upon that is, What is the meaning of the word
 “ rent ?” It is said that it means, the rent reserved
 upon the prior lease of the same lands. I do not
 know upon what ground that stands ; for it might
 just as well be asserted, that it meant the rental at
 the time the deed of entail was executed ; and this
 must be general ; so that if at the time of the execu-
 tion of that deed, and long after, the lands had been
 in the hands of the creator of the entail, and the
 several tenants of tailzie in possession, and the value
 had been increased, so as to be quadrupled, or in-
 creased in any greater proportion, you must resort
 to the old lease prior to the entail. The words are
 “ without diminution of rental,—at the least, at the
 “ *just avail for the time.*” It is said that the mean-
 ing of the words is this, “ without diminution of

Leasing
power in the
Queensberry
estate.

Meaning of
the word rent.

Rental.

Just avail for
the time.

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The fair construction of the words of the clause, taken altogether, is that the heir is to obtain the fair value at the time of leasing.

Clause requiring heir female to marry a Douglas, or at least a person who would take the name, if applicable, shows, that by rental the author of the entail meant the best rent.

“rental,” meaning by “rental,” the rent last reserved before the granting of the lease in question ; but that, if it should so happen that *that* rent could not be obtained, then that the lease might be made at such rent as could be obtained. This appears to me to be a very arbitrary interpretation of the words. The fair construction of the words, taking the whole together, and using the latter words as explanatory of the former, appear to me to be this,—that the creator of the entail shall be taken to have said, “ I mean by the words ‘without diminution of the ‘rental,’ that you shall let, at least, for the fair ‘avail at the time ; that is, I do not desire you to ‘get the utmost you can possibly obtain for the ‘estate, but that you shall get the just avail for the ‘time.’ ” This strikes me as the fair interpretation of the words, taking the whole together.

But it is said, that in this entail there is another clause, which interprets the meaning of this,—a direction that when any lady of the family should succeed to the estate, she should marry a person of the name of “ Douglas,” or at least a person who would take the name of Douglas. But what is the meaning of these words? That he wished the lady to marry a person of the name of “ Douglas ?” That was, in his mind, the preferable measure ; but that, if she should *not* marry a person of the name of Douglas, she should marry a person who should take that name. Does not that, if it operates at all, rather show the meaning in which the words respecting leases are used as I have interpreted them? That the entailer did not mean, by the words “ the “just avail at the time,” a worse thing than that

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which he had proposed to require under the former words?—If, therefore, the clause respecting marriage is to be used as interpreting the other clause respecting leases, it appears to me to have directly the contrary effect to that which has been contended for. It shows, that by “rental,” he meant the *best rent*, but that he then added,—“I do not desire you to reserve the best rent that can possibly be obtained, but take the just avail at the time; and *it* shall be sufficient.” If a construction is to be put upon the words “at the least,” in the leasing clause, by a reference to the same words used in the other clause, it seems to me that, instead of having the effect which is contended for, they have directly the contrary effect; that by the words “at the least, at the just avail for the time,” the entailer meant something less, and not something greater than he intended to express by the words “without diminution of the rental.” But taking the leasing clause by itself, when the entailer says, that the tenant of tailzie shall not set tacks nor rentals of the lands for any longer space than the setter’s lifetime, or for nineteen years, “and that without diminution of the rental,” adding, “at the least, at the just avail for the time;” can it be said, in an honest interpretation of the deed, that he meant that *less* than the just avail at the time should be taken? And do not those words, “at the least, at the just avail for the time,” interpret what he meant by the word “rental?” Do they not show, that by “rental,” he meant the best rent that could be obtained? and that he then meant to qualify the expression he had used, by adding, “but I do not insist upon your

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Taking grass-
sum is in
effect a dimi-
nution of the
rental or for-
mer rent, if
that was upon
grassum.

The clause
inserted by the
entailer, that
there might be
fair dealing
and equal
benefit be-
tween the
heir in posses-
sion and the
succeeding
heir.

“ getting the extremity of the rent that might be obtained ; take the just avail at the time, and I shall be satisfied.” That seems to be a much more fair and reasonable interpretation of the clause, than that attempted on the part of the representatives of the late Duke of Queensberry. But construe this clause even in the way in which the representatives of the late Duke of Queensberry contend it ought to be construed ;—is there no diminution of the rental by means of the leases in question ? is it not clear the payment of grassum is in effect a diminution of rental, taking the rental to mean the former rent ? What is the meaning of “ rental ? ” Is it *nominal* or *real* rent ? Is it that which a man is to receive for his own benefit, or that which is nominally held out to him as rent, but a part of which only can be beneficial to him ? The nominal rent may be 10 *l.* ; but if the consequence of the grassum taken by the granter of the lease is, that the deduction from that rent, instead of 2 *l.* becomes 5 *l.* is there not, by the operation of the grassum, a diminution of the former rental, in any reasonable sense of the word ? Is there not a diminution of the rental, in the view that this entailer seems to have had upon the subject ? Why did he insert this clause ? Did he not insert it, that there might be fair dealing between the tenant in tail in possession, and the succeeding heir ; that both might have equal benefit from the lease ? And is *this* fair dealing ? Have both an equal benefit ? It seems to me that, considering the effect of grassum, with respect to the clear sum to be received upon the rent reserved, it is impossible to say that a lease so granted, is not a lease granted with diminution of

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the rental. See the effect the grassum has upon the rent before reserved. As to all the world except the heir of entail, the grassum is considered as part of the rent; and all the charges upon the estate are assessed accordingly. It is admitted that the grassum is to be considered as part of the rent, with respect to all but the succeeding heir of entail. What is there in the law of entails that makes the condition of the heir of entail different from that of other persons with respect to the meaning of the word "rental?" I am not able to comprehend how it is possible to say that the grassum is *not* a part of the rent with respect to the heir of tailzie, when, with respect to every other person, it *is* a part of the rent. If it is part of the rent—if the grassums previously received are to be considered as part of the rent, when the land is let again (whether with another grassum or without a grassum) at the same nominal rent, the land is let at *less* than the rent that was before actually received, though the same rent is nominally reserved. The rent before taken by the granter of the lease, was compounded of the grassum and the reserved rent. When the lease which was so granted was either surrendered, or expired, if the grassum was not taken into consideration in fixing the reserved rent on a second lease, then the land is set with diminution of rent, in the strictest sense of the words, independent of the additional charge brought upon the actually reserved rent, by means of the grassum.

All charges
on the estate
are assessed
with a cal-
culation of
grassum as
rent.

Upon these grounds, therefore, I do conceive that the effect of taking grassums is, to make all leases which have been granted at the old rent upon gras-

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sums, or upon the surrender of leases granted upon grassums, not within the power of leasing given by the deed of entail; and that the lands comprised in such leases have been set with diminution of the rental, even if the word "rental" in the deed of entail is not to be construed, as I insist it ought to be construed, as meaning the rent which might be obtained for the estate at the time, and not the rent which was before reserved.--- There are no words in the deed of entail expressing that the word "rental" meant the rent before reserved.

In the act prohibiting the alienation of lands of the Crown, except under particular circumstances, and except by way of exchange, by which the last rental should not be diminished, if a question had been raised upon an exchange, what was the meaning of the word "rental," it must, unquestionably, have been construed to mean, that the value of the lands given and received in exchange should be the same; that the value of the land which the King should exchange with another person, should be no greater than the value of the land which he should receive in exchange. That act was intended as a restriction upon the power of the Crown to alien lands; and therefore, if the King exchanged lands with another, the act required that the lands which he should receive in exchange should be of equal value; that is, that the exchange should be without diminution of the rental of the Crown—the word "rental" there clearly meaning real annual value. The words of the statute must clearly and unquestionably mean the real value, and not the rent actually reserved.

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Taking the whole of the circumstances of these cases together, (upon which I should not have addressed your Lordships so long, in all probability, had the noble and learned Lord been able to have proceeded to-day, as he would most probably have anticipated much that has fallen from me upon the subject,) I can only add, that it appears to me that a fifty-seven years lease cannot be good, under the entail of the Neidpath estate;—that under the entail of the Queensberry estate, the word “dispone” is a word operating a restriction upon the granter of leases, as much as the word “alien;”—and that in respect to the leases in question in that case, they cannot be sustained under the power of leasing which is contained in the deed of entail, because they have been granted upon grassums, and at rents reserved on leases before granted on grassums, and therefore with diminution of the rental, and certainly not at the just avail at the time.

JUDGMENTS BY THE HOUSE OF LORDS

IN THE PRECEDING CASES.

DUKE OF BUCCLEUCH *v.* SIR JAMES MONTGOMERY,
&c.

In action of Declarator.

Die Lunæ, 12 Julii 1819.

IT is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, That the said interlocutor complained of in the said appeal, be, and the same is hereby reversed: And the Lords find, That William late Duke of Queensberry, had not power by the entail founded on by the parties in this cause, to grant tacks for terms of years, partly for yearly rent,

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and partly for a price or sum paid to the Duke himself; and that tacks granted by him upon surrender of former tacks which had been granted partly for yearly rent, and partly for prices or sums paid to the Duke himself, ought to be considered as partly granted for prices or sums paid to the Duke, and that such tacks ought not to be considered as let without diminution of the rental, or at the just avail, and are therefore to be considered, as between the persons claiming under the entail, as tacks which he had not power to grant by such entail: And it is further ordered, That with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this finding.

(signed) *Henry Couper*,
Dep. Cler. Parliamentor.

DUKE OF BUCCLEUCH v. HYSLOP.

In the Reduction.

Die Lunæ, 12 Julii 1819.

IT is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, That the said interlocutor complained of in the said appeal be, and the same is hereby reversed: And the Lords find, That the late Duke of Queensberry had not power, by the deed of entail founded upon by the parties in this cause, to grant the tack in question, in this cause, the same having been granted upon the surrender or renunciation of a former tack then unexpired, and which former tack had been granted by the Duke at the same rent, and also for a sum or price received by him; and the said tack in question, therefore, having been granted partly in consideration of the rent reserved thereby, and partly in consideration of a price or sum as before paid to the said Duke himself, and of the renunciation of the said former tack: And find, therefore, That this tack of the 30th of December 1803, ought to be considered *in this question with Hyslop*, as let with diminution of rental, and not for the just avail: And it is farther ordered, that with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as is just and consistent with this finding.

(signed) *Henry Couper*,
Dep. Cler. Parliamentor.

SIR J. MONTGOMERY *et al.* v. EARL OF WEMYSS.

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*Lease of Harestanes.*CASE OF THE
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Die Lunæ, 12 Julii 1819.

It is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of be, and the same are hereby affirmed.

(signed)

Henry Cowper,
Dep. Cler. Parliamentor.

SIR J. MONTGOMERY *et al.* v. EARL OF WEMYSS.*Whiteside—Liferent Leases.*

Die Lunæ, 12 Julii 1819.

THE Lords Spiritual and Temporal in Parliament assembled, find, That the said William late Duke of Queensberry had not power, by the entail founded upon by the parties in this cause, to grant tacks, partly for yearly rent and partly for prices or sums of money paid to himself, and that tacks granted by him upon the surrender of former tacks which had been granted partly for yearly rent, and partly for prices or sums of money paid to himself, as between the persons claiming under the entail, ought to be considered as set with evident diminution of the rental: And it is ordered, That with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as may be just and consistent herewith.

(signed)

Henry Cowper,
Dep. Cler. Parliamentor.

SIR J. MONTGOMERY *et al.* v. EARL OF WEMYSS.*Edstoun.*

Die Lunæ, 12 Julii 1819.

THE Lords Spiritual and Temporal in Parliament assembled, find, That the said Duke of Queensberry had not power, under the entail founded upon between the parties in this cause, to let tacks partly for rents reserved and partly for sums and prices paid to himself, and that

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tacks granted upon the renunciation of former tacks, and were made partly for rent reserved, and partly for sums and prices paid to the Duke himself, are to be considered as tacks made partly for rent reserved, and partly for sums and prices paid to himself, and that such tacks are not to be considered, in questions between the parties claiming under the entail, as let without evident diminution of the rental: And it is ordered, That with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as is just and consistent with this finding.

(signed)

Henry Cowper,
Dep. Cler. Parliamentor.

EARL OF WEMYSS *v.* HUTCHISON *et al. et e con.*

Crook.

Die Lunæ, 12 Julii 1819.

It is ordered, by the Lords Spiritual and Temporal in Parliament assembled, That the said causes be remitted back to the Court of Session in Scotland, generally to review the interlocutors therein complained of.

(signed)

Henry Cowper,
Dep. Cler. Parliamentor.

EARL OF WEMYSS *v.* MURRAY *et al. et e con.*

Flemington Mill.

Die Lunæ, 12 Julii 1819.

It is ordered, by the Lords Spiritual and Temporal in Parliament assembled, That the said causes be remitted back to the Court of Session in Scotland, generally to review the interlocutors therein complained of.

(signed)

Henry Cowper,
Dep. Cler. Parliamentor.

IN THE HOUSE OF LORDS.

The Rev. ARCHIBALD M'LEA, } *Plaintiff in Error.*
 Doctor in Divinity, - - - }
 JAMES WALKER, Sheriff's Of- } *Defendant in Error.*
 ficer, in Rothsay - - - }

THE stipendiary clergy in Scotland are liable to the payment of duties on their manses, parsonages, and glebes, by the stat. 43 Geo. III, c. 122, and 46 Geo. III, c. 65, and the assessed taxes imposed by the 48 Geo. III, c. 55; and are not exempted generally from taxation by the general laws of Scotland, nor by the Scots act 1593, c. 166.

Semble that they are also liable in respect of stipend, although by the stat. 1593, c. 166, it is ordained, "that all minister's stipends, in time cumming, be free from all tackes, pensiones, *taxations*, or impositiones quhatsumever, notwithstanding of onie gift or disposition made in the contrair," &c.

The word "taxation" in the act 1593, c. 166, is to be construed by considering the recital of the act; the occasion of the enactment and the other words which are coupled in the same clause, with the word "taxation."

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THIS cause arose out of a claim advanced on behalf of the clergy of the church of Scotland, that their order was entitled in law to a privilege of exemption from taxes.

In order to try the validity of this claim, the plaintiff in error brought, in the Court of Exchequer in Scotland, an action of trespass against the defendant in error, to recover damages for the seizure of a horse which was taken in execution under the circumstances stated in the special verdict subjoined.

The defendant pleaded the general issue, and the

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Special ver-
dict.

case having been tried by a jury, the following special verdict was returned: "The jurors, upon their oaths, say that the defendant took, &c. That when the defendant so took the said horse, he acted in execution of two warrants granted by the sheriff substitute of the shire of Bute, on two certificates and petitions at the instance of Archibald M'Lea, collector of taxes for the burgh of Rothsay, against the plaintiff, both of which warrants were dated the 25th May 1811, and authorized the poinding of the goods and effects of the plaintiff, for the recovery of the sum of 26*l.* 5*s.* 7*d.* being the amount of property duty for the year, from the 5th day of April 1809 to the 5th day of April 1810, assessed upon the plaintiff by the commissioners for putting in execution the act 46 Geo. III. cap. 65, for the burgh of Rothsay; for and in respect of his manse, glebe, and stipend, as minister of Rothsay; and for recovery of the sum of 4*l.* 3*s.* being the amount of assessed taxes for the year ending at Whitsunday 1811, upon the following articles: to wit; one occasional servant the sum of 6*s.* one riding horse the sum of 2*l.* 13*s.* 6*d.* and hair powder duty the sum of 1*l.* 3*s.* 6*d.* amounting in whole to the aforesaid sum of 4*l.* 3*s.* and the expenses allowed by the law for making the same effectual; and to which last mentioned sum the plaintiff had been assessed under the provisions of the statute 43 Geo. III, cap. 156, and 48 Geo. III, cap. 55.

"And the jurors further say, that the plaintiff is a clergyman of the established church of Scotland, &c.; and that the sum of 26*l.* 5*s.* 7*d.* was assessed

“ upon the plaintiff in respect of the profits arising to
 “ him from his said living as minister of Rothsay.

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“ And if upon the whole matter,” &c.

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Upon this special verdict the case was argued before the Court of Exchequer in Scotland, and on the 4th of July 1812, the Court gave judgment for the Defendant.

Against this judgment, the present writ of error was brought.

On behalf of the Plaintiff in error.

By the law and practice of Scotland, from the Reformation downwards, neither the stipend, glebe, nor manse of the ministers of the established church is chargeable with any public burden. This immunity is part of the public law of the land, which has not been altered by any of the statutes referred to in the verdict upon the record.

Argument for
Plaintiff in
error.

Before the Reformation, the clergy of Scotland possessed all the tithes, and one fourth of the lands of the kingdom. They paid one-half of all the taxes imposed upon the land and its fruits. They also made the contributions required of them to the Pope. They paid a fifth penny of their benefices to the King, and on extraordinary occasions they paid tenths.

When the Reformation made its way into Scotland, all the popish establishments were swept away, the King and the aristocracy of the country appropriated all the property and revenues of the clergy, and it was some time before the protestant ministers acquired right to any permanent provision.

The first act that appears upon the subject is one

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of the Privy Council, and bears date in the year 1561. It was afterwards confirmed by act of parliament 1567, cap. 10, which, upon the preamble, that “ the ministers have been long defrauded of their “ stipends sua that they are becomin in great poverty “ and necessity ; statutes and ordaines that the haill “ thrids of the haill benefices of this realm sall now “ instantly and in all times to come, first be payed “ to the ministers of the Evangel of Jesus Christ “ and their successors ; ay and quhill the kirk come “ to the full possession of their proper patrimonie “ quhilk is the teindes. Providing always, that the col- “ lectors of the saidis ministers make zeirlic compt in “ the checker of their intromission sua that the mini- “ sters may be first answered of their stipendis apper- “ teyning to everie ane of them. And the rest and su- “ perplus to be applied to our Sovereine Lord’s use.”

By statute 1572, cap. 52, an act of secret council was ratified, setting apart all benefices not exceeding 300 marks, as a provision for qualified ministers.

In the year 1581, an act was passed, according to which the whole kingdom of Scotland is divided into certain parishes, which were intended to be of moderate bounds, and for every one of which a minister was to be appointed, having a suitable stipend. The words of the act are, “ It being found “ maist diffieil that in the charge of plurality of kirks “ ony ane minister may instruct mony flocks, there- “ fore it is thochet expedient, statuted and ordained, “ be our Sovereign Lord and his three estates of “ this present parliament, that every parish kirk and “ sameikle bounds as sall be found to be a sufficient “ and competent parochin, therefoir sall have their

1581, c. 100.

“ own pastour with a sufficient and reasonable *stipend*
 “ according to the stait and habilitie of the place.”

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The teinds of the benefices in which the parish is locally situated were in almost all cases burdened with the stipends here referred to, which were granted to the clergy in the form of warrants called assignations by the commissioners of teinds against the titulars of the respective benefices, authorizing and requiring them to make payment to the minister of a certain number of bolls, or a certain sum of money in name of stipend. Under these warrants, the minister had no right to any teind; but merely to a certain quantity of victual or a certain sum of money, while the titular remained proprietor of the whole teinds, and continued to draw them either in his own name or by means of his tacksman. These stipends form the principal part of the income of the clergy at this day. They have no other but that which arises from their glebes, which have their origin in the operations of the same æra.

By statute 1587, cap. 29, parliament upon the preamble that the church owed their temporalities to the improvident and profuse liberality of the crown, that the church had no longer any use for that part of their property, while on the other hand the crown stood much in need of it, “ unities, annexies, and
 “ incorporates to the crown of this realm to remain
 “ therewith annexed, and as it were propertie thereof
 “ in all time cumming, and with our said Sovereine
 “ Lord and his successors for ever, all and sindrie
 “ lands, lordshipes, barronnies, castles, towres, for-
 “ talices, mansions, manour places, milnes, multures,
 “ wooddes, schawes, parks, fischings, townes, villages,

1587, c. 29.

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“ burrowes in regalities, and barronie annual rents,
 “ tenents, reversions, customes, great and small feu
 “ farmes, tennents, tennandries, and service of free
 “ tennents. And all and sundrie utheris commo-
 “ dities, profites and emoluments quhatsumever,
 “ alsweill to burgh as to land (except as hereafter
 “ sall be excepted in this present acte) quhilkis
 “ at the day and dait of thir presents, viz. the
 “ xxix day of July the zeir of God 1587 zeirs,
 “ perteinis to quhatsumever archbishoppe, bishope,
 “ abbote, prior, prioresses, &c. Except and alsua
 “ foorth of the said annexation, all and quhat-
 “ sumever mansiones of parsonages and vicarages
 “ annexed to parochie kirkes with four aikers of
 “ glebe maiste west to the kirk, and commodious for
 “ the minister serving the cure theirof for his better
 “ residence thereat, quhilk sall not be nor ar com-
 “ prehended in the said annexation. But sall re-
 “ main with the minister, parson or vicar or uthur
 “ quha sall be provided thereto for serving the cure
 “ according to the actes of parliament maid there-
 “ anent of before.”

Stat. 1572,
 c. 48.
 Stat. 1578,
 c. 62.
 Stat. 1621,
 c. 10.

These were the first glebes in Scotland after the Reformation. They were part of the church lands reserved to the ministers upon the new establishment, and it was provided that they should not be liable either in teind or feu duty. Later statutes have authorized the designations of glebes out of lay-lands, but they have always been held in law entitled to the same privileges as the original glebes set apart by the former statutes. They are allodial, neither paying any feu duty nor acknowledging any superior. No teinds are exigible out of their fruits, and they have neither been valued in the cess books,

nor charged with cess or any other burthen imposed for behoof of the state or of the parish ; in respect, as the stat. 1621, c. 10, expresses it, “ that the same “ is dedicated and appointed *ad pios usus*.”

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These provisions for the clergy were from the beginning privileged. The act 1587, c. 29, declares they shall “ be free of first year’s fruits and fifth penny.” The act 1592, c. 123, narrates that by several previous statutes which are not now extant, they were preferable to the king upon the benefices burdened with the stipend. Finally, in the year 1593, an act was passed in the following terms : “ For saemeikle as sundrie ministers quha has been “ in long possession of their stipends be verteu of “ their assignations, are troubled be pensioners or “ tacksmen, quha hes tane in tack gift or pension, “ either their haill stipends or an great pairt thereof, “ and hes obtained ratification in parliament there- “ upon. Therefore our Sovereine Lord with advice “ of his estates of this present parliament, ordaines “ that all ministers stipends in time cumming, be “ free from all tackes pensiones *taxations or im- “ positiones quhalsumever*, notwithstanding of onie “ gift or disposition made in the contrair to the effect “ that the ministeres may bruik their stipends peace- “ ably in all time cumming, without any trouble “ according to their assignations.”

Stat. 1587,
c. 26. Stat.
1592, c. 123.
and the Stat.
1593, c. 166.
declare sti-
pends free of
all im-
positions.

The first taxation imposed after the passing of this act was in the year 1597. Parliament grants 200,000 merks to the King, 100,000 of which is to be paid by the spiritual estate, 66,666*l.* 8*s.* 10*d.* by the barons freeholders, and 33,333*l.* 4*s.* 6*d.* by the burghs of the realm. The portion falling on the spiritual estates is to be paid by the bishops, abbots,

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and beneficed persons, and by them alone. In this list ministers having stipends are not included. Further, these beneficed persons were required to pay not only for what was in their own natural possession, but for the income drawn by those possessing under them; and while for their relief it is provided that they shall have recourse against "their vassals, feuars, tacksmen, and pensioners," it is not provided that they shall have relief from ministers possessing part of the teinds by the assignments before-mentioned; and it is not alleged that they ever had any relief from this body.

1633.

Act 1.

In the year 1633, the lay members of parliament granted to King Charles the First, thirty shillings in the pound upon *the old extent** for six years, beginning with the year 1634, and "the archbishops and bishops for the spiritual estate, granted a proportional supply out of all archbishopricks, bishopricks, abbacies, priories, and other inferior benefices, as they have been accustomed to be taxed, in all time bygone whensoever, the temporal lands of this kingdom were stented to thirty shillings the pound land, of old extent." That act further contains the following general revocation of all privileges and immunities; "And further his Majestie and the said estates annul and discharge all privileges and immunities whatsoever, whereby any persons may think themselves free of payment of their present taxation; the privileges granted to the ordinary senators of the colledge of justice, and the taxation of benefices given, disposed, and mortified for the entertainment of the universities,

* For an explanation of the old extent, see *ante*, p. 164. note.

“ colleges, and hospitals within this kingdom only
 “ excepted.”

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Neither stipends nor glebes were ever charged with any portion of this tax; it appears, however, that *benefices* such as parsonages and vicarages, though set apart for the sustenance of the reformed clergy, and at the same time not greater than an ordinary stipend, in respect of their being *benefices*, were burthened with this or similar taxations. For among the rescinded acts there appears a statute, the 1641, 2d Sept. preamble of which bears, that the clergy holding vicarages and other small benefices had been grievously oppressed by the collectors of the revenue, that such exactions were contrary to law as well as equity, and declaring stipends, and *benefices* similar to stipends, free of all taxation. The act is entitled, “ An act for freeing of vicarages provided to ministers for their stipends of taxations;” and the preamble is, “ Our Sovereign Lord, and estates of parliament, considering the distractions that ministers are brought into, and other prejudices and losses sustained by them, by taxations *craved of vicarages* which are assigned and provided to them, as a part of their stipends in so far as they are assigned and provided, and that *it is against all reason and equity, and former acts of parliament*, that ministers’ stipend should be burdened with impositions and taxations; therefore statutes and ordaines (for eschewing of these inconveniences and prejudices,) that no vicarage teinds, nor rents thereof assigned or provided, or to be assigned or provided, to ministers as a part of their stipends, be burdened or affected with any taxations of impositions bygone, owing, unpaid, or in time coming,” &c. Upon this

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preamble, vicarages, provided they make part of the modified stipend, are declared to be free of all taxations, in the same manner as all other stipends were admitted to be in virtue of the previous acts of parliament. As to stipends not in the predicament of a benefice, there was no occasion to make any enactment, because they never had been charged with any tax.

During the civil wars, and afterwards during the usurpation, full effect was given to these previous statutes, and in particular in the execution of a measure of Oliver Cromwell, the express purpose of which was, to make a fair and equal valuation of all the property in Scotland, for the purpose of a general taxation, without regard to any private privilege whatever. The legislative provisions were as comprehensive as general terms can make them ; and yet the stipends and glebes of ministers were considered as protected by the public law of the land, and held to be free of all burden*.

On this occasion, every county proceeded by itself to value its own lands. The proceedings of several counties are still extant ; and, for all Scotland, the rent thus valued, as it stood in the year 1656, is the rule according to which the cess is levied at this day. Yet there is no instance of teinds forming part of a modified stipend, or of glebes, being valued or subjected to any part of the burden.

1656, c. 14.

The words of Cromwell's act are, " And for the
 " more equal and right proportioning of the several
 " sums before mentioned, be it further enacted by
 " the authority aforesaid, that the several sums of
 " money to be rated, assessed, and levied, in vertue

* See Wight, vol. 1. p. 182.

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“ of this act, shall be taxed and assessed by a pound
 “ rate on the several parishes in the respective coun-
 “ ties, cities, and places aforesaid, *for all and every*
 “ *their lands, tenements, hereditaments, annuities,*
 “ *rents, parks, warrens, goods, chattels, stock, mer-*
 “ *chandizes, office, or any other real or personal estate*
 “ *whatsoever, according to the value thereof*; that is
 “ to say, so much upon every twenty shilling rent or
 “ yearly value of land and real estate, and so much
 “ upon money, stock, and other personal estate, by
 “ an equal rate, (wherein every twenty pounds in
 “ money, stock, or other personal estate, shall bear
 “ the like charge as shall be laid upon every twenty
 “ shillings yearly rent or yearly value of land,) as
 “ will raise the monthly sum or sums charged upon
 “ the respective counties, cities, and towns aforesaid.
 “ For the better effecting whereof, it is hereby
 “ enacted, that the several and respective commis-
 “ sioners hereby appointed for the several and re-
 “ spective counties, cities, and towns aforesaid, shall
 “ meet together at the most common and usual place
 “ of meeting in each of the said counties, cities, and
 “ towns respectively, on or before the 15th day of
 “ July, in this present year 1657.

“ And the said commissioners, or so many of them
 “ as shall then and there attend and be present, shall
 “ cause this present act to be put in execution, ac-
 “ cording to their best discretion and judgment; and
 “ having agreed amongst themselves of some general
 “ rules and directions for the doing thereof, and ap-
 “ pointed another time for the second general meet-
 “ ing, which shall be on or before the 30th day of
 “ July aforesaid at the furthest, to receive the returns
 “ from the several counties, stewartries, cities, bur-

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“ roughs, parishes, and places ; and there with all
 “ convenient speed, they, or any two or more of them,
 “ shall nominate and appoint two or three of the
 “ honest and able inhabitants in the several and re-
 “ spective parishes to be surveyors and assessors, who
 “ (or any two of them) are to ascertain and rate the
 “ yearly value and profits of the said parishes and
 “ places for which they shall be appointed surveyors
 “ and assessors, and shall return the same to the said
 “ commissioners, or to such person or persons as
 “ shall be appointed to receive the same.” The act
 also contains the following clause, abolishing all pri-
 vileges : “ And be it hereby enacted by the autho-
 “ rity aforesaid, that *no privileged place or person,*
 “ body politique or corporate, within the cities, coun-
 “ ties, towns, and places aforesaid, *shall be exempted*
 “ *from the said assessments and taxes,* but that they
 “ and every of them, and also all fee farm rents, and
 “ other rents of the late king’s revenues, all rents
 “ and other sums received by the late court of ward,
 “ out of any infants or lunatique estates, and all other
 “ manner of rents, payment, and sums of money and
 “ annuities issuing out of any lands within any city
 “ or county, shall be lyable towards the payment of
 “ any sum by this act to be taxed and levied.”

The act also contains the following exception :
 “ Provided also, that nothing contained in this act
 “ shall be extended to charge any of the masters
 “ or scholars of the universities or colledges in Scot-
 “ land, or any other officers in the said universities,
 “ colledges, or schools of any hospital or alms-houses
 “ for and in regard of any stipend, wages, or profits .
 “ whatsoever arising or growing due to them in
 “ respect of the several places and employments in

“ the said universities, colleges, schools, hospitals,
 “ or alms houses, for or in respect of any rents or
 “ revenues being to be received or disbursed for the
 “ immediate use and relief of the same.” It was necessary expressly to exempt the masters and scholars of the universities, because their income was by the general law of Scotland subject to taxation; but it was held unnecessary specially to exempt the clergy, because under the general law they had an immunity.

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This enactment was carried into full effect during the Usurpation. But the stipends and glebes of the established clergy in Scotland continued, notwithstanding this statute, and the taxation which followed upon it, free of all imposition whatever. After the Restoration, from antipathy to all Cromwell's measures, the rule of valued land * was abandoned, and that of the previous extent adopted in the levying of the land-tax.

Afterwards it was thought expedient to return to the new valuation, and in order to raise the next supply that was granted, which was by act of convention† in the year 1667, commissioners were appointed, with power “ to call for and consider the valuations

Act of Convention,

23d Jan. 1667.

* See Vol. 2. p. 1, note.

† This was one of those “ *Conventions of Estates*,” which were occasionally called upon sudden exigencies, real or supposed. The formal citation of all those who had right to sit in parliament, was on these occasions omitted. The king, on the plea of emergency, called together as many of the three estates as could be speedily assembled. By a statute of James IV. (1503, c. 85.) it was ordained, that “ the commissaries and “ headsmen of boroughs be warned quhen taxes or contributions are given, &c.” The powers of these conventions were limited to the particular business for which they were called.

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“ of all lands, *teinds*, and other real estates within
 “ their respective shires and burghs ; and such as they
 “ shall find just and equal, that they approve thereof
 “ and appoint the same to be the rule for levying and
 raising this present supply.” Where estates have been
 split among different proprietors since Cromwell’s
 valuation, or “ when they shall find any just cause
 “ by inequality, the commissioners are to value of
 “ new again.”

Notwithstanding these comprehensive words, ministers stipends were not valued, or taxed in any way ; and there is a clause in this act, from which it appears that the general expressions above used could not be extended to glebes or stipends. Power is given in these terms : “ As also to value the rent of all arch-
 “ bishopricks, bishopricks, and other benefices *in so*
 “ *far as they exceed the ordinary value of modified*
 “ *stipends* : provided always, that notwithstanding
 “ of the valuation thereof within the shire where
 “ there is any such lands, *teinds*, or other real rent,
 “ the total and proportions above specified of the
 “ said shires continue without any alteration.” This shows clearly that stipends, and benefices not better than modified stipends, were not to be valued ; and accordingly they were not valued.

The valuations made in virtue of this act have regulated such taxations ever since. The heritable property, exempted under that act, has been exempted ever since ; and the property burdened, whether lands or *teinds*, have ever since been burdened according to the valuations then made.

The next supply which was granted, was in the year 1670, by act of parliament, which appoints it

“ to be raised and paid out of the land rent, in the same manner, according to the same proportion, and with the same exceptions that the former supply granted to his Majesty by the convention of estates, in January 1667, was raised.”

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A new supply was granted in the year 1672, to be raised and paid according to the valuation of the same act of convention.

1672.

In the year 1678 a further supply was granted by an act of convention, which it is declared shall be levied “ according to the present valuation.”

1678.

In the year 1681 an act of parliament was passed, granting an additional supply, which in like manner is to be levied in the manner and proportions prescribed by the act of convention. This was a large supply, amounting to 1,800,000 *l.* Scots, and it was thought proper to give the landed proprietors some relief from the vassals, feuars, tenants, subtenants, and inhabitants in their lands. In particular, they were to have relief from each gentleman, of a sum not exceeding 6 *l.* Scots, for each tenant 4 *l.* Scots, and for each tradesman, cottar, or servant, 20 *s.* Scots.

1681.

After these acts, the mode of levying the supply became established, and so much understood as a matter of course over the whole nation, that in many acts of parliament the supply is granted without specifying how it is to be levied, while in others the rule of the convention 1667 is especially prescribed.

This however made no difference in practice; for, whether the act of parliament was express or silent on the subject, the will of the legislature was understood to be, that the rules of the act of convention

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1690, c. 6.

1667 should be observed, and both stipends and glebes left unburdened.

After the revolution all personal privileges were expressly recalled. By statute 1690, c. 6. a new supply is granted; and it is declared, "That no person or persons shall be exeemed from payment of their proportions of this supply for their lands upon any pretext whatsoever, excepting mortified lands allenarly notwithstanding of any former law, privilege, or act of parliament in the contrary." These terms are sufficiently comprehensive, to take away any privilege whatever; but yet they were not held sufficient in law to take away the exemption in favour of stipends and glebes, which by the public law were held not to be taxable subjects. Accordingly the very same parliament, while it gives the heritor relief against gentlemen, tenants, feuars, tradesmen, and cottars, gives him no relief against clergymen.

Cap. 9.

1693, c. 2.

A new supply was granted in the parliament, 1693, c. 2. which in like manner declares in the most peremptory terms "that no person or persons shall be exempted from payment of their proportions of this supply for their lands upon any pretext whatever."

Even these words were not held sufficient to affect the right of the clergy to immunity, in respect of their glebes, mansions, and stipends.

Cap. 9.

In the same session of parliament, however, a poll-tax was imposed, by which it is ordained that all persons of "whomsoever" age, sex, or quality shall be subject and liable to the poll-tax of six shillings Scots per head, except poor persons who live upon

cnarity, and children under the age of sixteen years. Persons of higher rank are ordained to pay according to their presumed wealth, and in particular *all ministers* having benefices *or stipends*, and parish kirks not planted, shall pay twelve pounds of poll. Here the clergy are burdened, because the tax has no connection with land or teinds, or heritable income of any kind, but is a personal tax not falling under the general law by which the property of the clergy is exempted.

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Another poll-tax was afterwards imposed by parliament, but it was conceived to be unconstitutional to subject the clergy even to a personal tax, and accordingly they were omitted, which could not have happened *per incuriam*, while every other description of person is burdened.

1695, c. 10.

The same immunity was preserved by the clergy, notwithstanding the revocation of all previous personal exemptions in several subsequent statutes. In all of these it is declared, that no person or persons shall be exempted from payment of their proportion thereof, for their lands, upon any pretence whatever, excepting mortified lands; and yet, no contribution whatever was levied on the clergy. Under all the land-tax acts above mentioned, although the magistrates of royal burghs are empowered to assess the inhabitants, without exception, in relief of the burghs quota, no assessment has ever been imposed on manse or glebes within burghs*.

1702, c. 6.
1704, c. 4.
1705, c.
1706, c. 2.

See the observations of Sir George M'Kenzie, upon the acts 1578, c. 62. 1587, c. 26. and 1593, c. 166. In the discussion of the act 1597, c. which directs the supply to be

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The plaintiff does not insist upon any *personal* privilege : but so far as respects the house and window duty, and the property duty, levied upon his manse and glebe and stipend, there is no law to justify the warrant specified in the pleadings. That the expressions used in the statutes are universally comprehensive, is not denied. They include all houses, lands, and annual income, which by the law of Scotland are subject to taxation ; but the houses, glebes, and stipends of the clergy have not been in that predicament for more than two hundred years. It is extremely questionable whether after the act of union it was within the power of parliament to burden these subjects with any tax ; and supposing that parliament had the power, the ancient immunities of the church could not be taken away without a formal repeal of the law conferring them, which is not to be found in the statutes referred to by the defendant.

According to the public law of Scotland, the manse, glebe, and stipend of the clergy were not taxable. If the most comprehensive form of words imposing the burden, accompanied with a revocation of all existing privileges, could have burdened these subjects, the commissioners under former acts must have included them ; but they never did, and for this no reason can be assigned but that by law the subjects

levied according to the actual value of the lands, he says, “ this “ can be of no consequence to stipendiary ministers, seeing by act of “ parliament, 162 James 6, parl. 13, they are freed and exempted “ of all taxations and impositions.” See also Forbes on Tithes, Erskine, b. 2, tit. 10, s. 50 ; Kaimes’ Abridgment of the stat. 1593, c. 162 ; Spottiswood on Hope’s Minor Practicks, tit. 2, s. 16 ; Craig, Feud. lib. 1. dieg. 12, s. 14.

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were free of all imposition whatever, and not taxable. There may be countries where the property and the income of the clergy are subject to taxation, and there may be other countries where the churches and courts of justice, and all public property, are subject to taxes, payable by those who take benefit from it. But this never was the law of Scotland.

According to the articles of the union, that law is unalterable. The constitution of the church of Scotland, with all the rights and immunities belonging to it, was the object of great anxiety at the union, and it was not considered as expedient that the united parliament should have power to alter it. It was therefore made a condition of the union, that this should not be competent even to parliament. The only question is, whether it is not to be considered as part of that constitution, that the property set apart for the subsistence of the clergy should have an immunity from all taxation; in other words, whether any portion of it can be taken from the church, and used for the purposes of the state.

As to the particular expressions used in the property duty act, it may perhaps be maintained that they prove that parliament understood that there were *teinds* in Scotland belonging to ecclesiastical persons falling under the general provisions of that statute; for there is no doubt that in the rule for assessing the duties imposed, *teinds in Scotland* belonging to any ecclesiastical person are mentioned. But these expressions do not occur in the clause imposing the duty; and that clause does not contain a repeal of the previous law, declaring the property of the clergy free of all taxation. Neither the common nor

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the statute law of Scotland have been altered. The courts in Scotland will administer this statute to the subjects of Scotland precisely as they would have done if this union had never been made. This act could not have included the property of the clergy at any previous period, for it has been shown that a long succession of statutes containing still broader and more comprehensive clauses were never so interpreted.

This is no new question. It occurred in every reign from James VI. down to the union; and during the whole of that period there is not to be found a lawyer who ever maintained that such expressions could affect the property of the clergy; while, on the other hand, every lawyer who has had occasion to speak upon the subject, gives it as his opinion, that such enactments do not embrace that property; and in practice the commissioners of the revenue never did charge either the stipend, glebe, or manse of the ministers with any tax. They held them free, not because the expressions of the revenue statutes did not embrace teinds, and lands, and houses, for as to that there could be no dispute; but because by the general law of Scotland, the teinds, lands, and houses of the clergy were held to be *public property*, and not subject to any tax.

The expressions used in the rule for assessing the property duty, do not apply to the property of the Scotch clergy. That they do not apply to their glebes and manses is obvious; and it is equally certain that they do not in general apply to their stipends. By the decrees in the Teind Court, a certain sum of money, or a certain number of bolls of

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corn and meal, is modified as a stipend, and the minister has a right to demand that money and that quantity of victual from the titular, but he has nothing to do with the teinds of the lands. These belong to the titular or heritor whoever he be, who draws them, and he becomes personally responsible to the minister for the stipend modified. When therefore this rule speaks of teinds belonging to ecclesiastical persons, it can have no meaning, unless it holds the titulars, as the successors of the ancient clergy, to be entitled to this appellation. There may be eight or ten cases in Scotland, where the minister succeeding to the whole of an old benefice is the titular, but in general he is no more than a stipendiary, who has nothing to do with the teinds, but draws annually a sum of money, or a quantity of victual, from the titular or heritor. Accordingly Mr. Erskine says, "they are all stipendiaries."

Even private rights, in virtue of which individuals have enjoyed immunity from particular taxes, have never been held to be revoked by implication. If parliament found them inconvenient, and thought it necessary to take them away, they did so by an express act, and then they granted compensation.

A company of soap-boilers in Glasgow, for certain reasons, obtained an exemption from duties on soap, and although they were never mentioned in any subsequent act of parliament, yet they constantly enjoyed their exemption till they were deprived of it by special act of parliament, when they obtained 6,000 *l.* as a compensation for the loss.

Mr. Forbes of Culloden, by two unprinted acts of parliament, obtained an exemption from duties upon

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the spirits and malt made from grain which grew upon his estate. He was not particularly exempted in any excise acts afterwards made, yet he enjoyed his privilege till lately, when the act depriving him of it, provided a compensation to him of about 20,000*l.* after the case had been submitted to a jury.

The Duke of Richmond's tax upon coals is an illustration of the same principle.

The statutes imposing the property and assessed taxes, contain no provision excluding this privilege. The maxim of law must therefore prevail—*Generalia non revocant specialia*. *Greer v. Mitchell**.

The word "stipend," in the schedule to the act 46 Geo. III. c. 65. is not applicable to the Scotch clergy; for it is not payable by his Majesty or out of the public revenue†. Nor does stipend come

* D. P. 27 April 1814, and see Co. Litt. 115 a. Comyns' Digest, tit. Parliament, R. 23. and Prescription, F. 3. *Rex v. Pugh*, Douglas's Reports, 1st edit. p. 179; Faculty Decisions, App. to vol. 10, Jan. 29th 1788. The Magistrates of Edinburgh against the College of Justice. The Duke of Queensberry and Earl of Hopetown.

† The word "stipend" occurs in schedule E. of the statute 43 Geo. III, c. 122, under the following title and context :

"Schedule of the rates and duties payable by persons having, using, or exercising any public office or employment of profit.

"Upon every publick office or employment of profit, and upon every annuity, pension or stipend payable by his Majesty, or out of the public revenue of Great Britain, &c."

Schedule D. seems more comprehensive. By it, duties are imposed upon "the annual profits arising to any person resident in Great Britain, from any profession, trade or vocation."

The same words are repeated in the schedules set forth in the subsequent statutes, and re-enacted with additional and special directions as to the mode of assessment, &c.

under the word "teinds," they are rather a burden upon the teinds.

As to personal taxes, such as that on the wearing of hair-powder, the plaintiff does not claim exemption. Those taxes stand on a different principle.

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On the part of the defendant in error.

There is no evidence that the legislature of Scotland ever contemplated an exemption from taxes as a part of the provision of the reformed clergy. On the contrary, the maintenance of the clergy was always recognized to be a burden to which the holders of teinds were in justice subject, as the condition of their right; and a grant to the church of an exemption from taxes, of which the burden must evidently have rested on the nation at large, would have been contrary to this universal understanding. The exemption of the clergy from first fruits and the fifth penny, was of quite a different nature. These were parts of benefices which had been seized

Argument for
Defendant in
error.

The statute 46 Geo. III. c. 65, s. 74, provides, "that the duties thereby granted, including the duties contained in the schedule marked A. (which is a transcript from the former act,) shall be assessed and charged under rules which shall be construed to be a part of the act, and to refer to the said duties as if the same had been inserted under a special enactment." The rules are then given under numbers. N° III. contains rules for estimating lands, &c. therein mentioned, which are not to be charged according to the preceding general rule. It then provides that the annual value of all the properties after described shall be understood to be the full or average amount for one year of the profits, &c. And in the second head of this rule are specified "all teinds in Scotland belonging to any ecclesiastical person."

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by the Pope ; and, in his stead, had fallen to the King. These, therefore, formed a most natural subject for appropriating to the provision of the reformed clergy ; and when the corruptions of Popery were in every respect overthrown and reprobated, it was reasonable, that the few protestant clergy who had obtained benefices, should not be subjected to this papal encroachment. The exemption of glebes from teind, was as little similar to the privilege under consideration. Teinds were no public tax, but a private property. The holders of teinds too were liable to maintain the clergy ; and it would therefore have been absurd to draw teinds out of the legal provision of land modified to the clergy. Nor had it been ever agreeable to the canon or ecclesiastical law, that glebes should pay tithe. *In every respect, therefore, exemptions of glebes from teinds was totally dissimilar from a general exemption from national taxes.* These are not instances of an intention in the legislature of Scotland to provide for the clergy, by giving them a general privilege of exemption from taxation.

1593, c. 166.

The act of 1593 cannot be construed to contain any general exemption of the clergy from taxation. It cannot be held to exempt them from any thing more than taxations or impositions from their stipends. The statute 1663, c. 24, imposed a part of the expense of maintaining the universities *on the clergy alone*, which at that time were episcopal. The equity of this arrangement consisted in this, that the universities were regarded as part of the church establishment ; and there is no reason to doubt, that the clergy had consented to it. The statute says,

1663, c. 24.

"there being an expedient proposed." And it is to be presumed it was proposed by the clergy. When this was done, it was thought reasonable to declare, that it should not afford a preparative or precedent for imposing peculiar burdens on the clergy without their own consent. The reason of this evidently was, because the burden was imposed on the clergy alone, and might be supposed to afford a dangerous example to a parliament, in which they had little influence. That it did not allude to any general exemption of the clergy from taxation is sufficiently evinced by the act of convention, 1667, granting a supply or land-tax, in which the clergy are subjected. It is true, that stipends and benefices not exceeding a sufficient stipend, are exempted from this tax. But this is not by any reference to a general privilege previously existing in law. It is by a special expressed exemption; and it follows after similar exemptions of a much broader nature given to the members of the college of justice, to universities, colleges, schools, and hospitals. In the act 1667, there is a personal or poll-tax, from which, in like manner, the clergy are exempted. But here also the exemption follows after that of noblemen, barons, heritors, and liferenters; and it is followed by that of schoolmasters, readers, precenters, their wives and children; and also the college of justice, officers of the mint, and their wives, children, and servants. This affords no evidence of a general privilege of the clergy to be exempted from all taxation.

In the act of parliament 1693, chap. 9. imposing 1693, c. 9. a poll-tax, it is confessed that the clergy are in-

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1695, c. 10.

1698, c. 12.

Records of
Parl. Book 35.
Vide App.

cluded, even stipendiary ministers, being set down as a class liable to a distinct duty. In the other acts, imposing poll-taxes, the clergy are also included. Even the stipendiary clergy are not exempted, although they are not subjected to a rate of poll-tax as a distinct class; but by act 1695, chap. 10. they are liable as "*gentlemen*." And even if they could have degraded themselves by repudiating that character, they are still liable to the lowest rate, which applies "to all persons of whatsoever age, sex, or quality, except poor persons, who live upon charity, and children under the age of sixteen." And by act 1698, chap. 12. they are liable as "*unlanded gentlemen*." It is said that a supplication was presented by the episcopal clergy for exemption: but it appears, that this claim was rejected, on the ground that clergy in general were *not* exempted. It appears by the records of parliament, that in 1704, Mr. Campbell and others, tacksmen of the poll-tax, 1695, gave in an account with regard to it, containing the total charge against them, and also the discharge. In this discharge, they stated the following article: "By the poll of the *episcopal* clergy 6,000*l*." This was stated as a discharge, on the ground that they were not entitled to levy it. But on this article, the committee of parliament made the following observations. "There should be no allowance for the poll of those clergymen, except their number be mentioned, in respect that no exemption subsists, except for clergy of Edinburgh, *all other clergy being liable*." In what way the clergy of Edinburgh were exempted does not appear; but it cer-

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tainly was not by any general privilege possessed by the clergy at large. The observations of Mackenzie and Forbes cannot be supposed to relate to any universal exemption from taxation enjoyed by the clergy. Accordingly, it will not be said, that in practice the clergy ever pretended to any exemption from *customs or excise*, though customs were ancient in Scotland, and excise was introduced there in 1644. The treaty of union, if the clergy held any such privilege, would certainly have taken it away; or the subsequent revenue statutes, in which there is no trace of such a privilege, but clear proof that none existed. In the 48th Geo. III. chap. 55. there is expressly given to the clergy an exemption from hair-powder duty; but it is limited to such clergy whose incomes do not exceed 100*l.* per annum. There is a multitude of statutes imposing duties, from which it was never imagined that the clergy of Scotland had any privilege of exemption. As to the pretended exemption in practice from the window-duty, it appears from the minute-books of the exchequer, that the clergy never pretended to demand it as of right, but obtained, as a favour from the lords of the treasury, a delay of levying. They were put *insuper*, as it is called, until there should be time given to apply to parliament, for an express and special exemption or other relief to the clergy from that tax. But no existing right of exemption was either recognized or pretended.

Kaimes' Stat.
Law, *vide* Customs,
Excise.

48 Geo. 3.
ch. 55.

The claims of the plaintiff to exemption from property-tax on his manse and glebe, and from assessed taxes on his horse, servant, and hair-powder,

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is void of foundation ; for it cannot be pretended that there exists any *special* privilege in regard to these taxes. It is not pretended that the acts imposing them bestow any exemption from them upon the clergy of Scotland ; nor can it be pretended, that any ancient statute affords any argument for such a privilege, by a prospective regulation.

As to the property-tax on the plaintiff's stipend, it appears to be said that a special exemption exists, in virtue of the Scotch statute of 1593. The clergy had no privilege of exemption in general, or from any one tax, land-tax, poll-tax, customs, or excise. But yet it is said the Legislature had given them a privilege of exemption from all taxes which could affect their stipends. It is said this exemption is still in force, and that it applies to the property-tax.

This argument is founded solely on the statute 1593, cap. 166. But the evils to be remedied by the statute, were claims made on the stipendiary clergy by private parties in virtue of tacks, gifts, or pensions. These might be ratified in parliament, but still were private rights. Not a word occurs in the act as to public taxes, of which indeed there existed none at that time which could be said to affect stipends. It is evident that the word "taxations," which in the statute is thrown along with tacks, pensions, and impositions, alludes only to burdens imposed on the stipends in favour of private parties, and was used just as the word "impositions" was used to exclude grants under forms that might have been pretended not to be tacks or pensions. That is demonstrated by the words following ;

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“ notwithstanding of onie gift or disposition maid
 “ in the contrair.” This shows it was only tax-
 ations or impositions by gift or disposition, that were
 contemplated, and it will not be said that a national
 revenue statute is a “ gift or disposition.” There is
 no doubt in what sense the word “ taxation ” is used
 in this statute, the context removing all ambiguity.
 The word may perhaps have been in other parts of
 the Statute-book applied to public taxes ; but such
 was not its meaning in the statute 1593, chap. 166.
 The plaintiff is driven to contend, that under
 “ gifts or dispositions,” public statutes are included ;
 and then he must contend, that the act 1593, was
 a law that ministers stipends should be free notwith-
 standing future public statutes made “ in the
 “ contrair ; ” an attempt to annul, by prospective
 provision, future statutes. No legislature has power
 so to bind itself.

The acts of supply, 1665 and 1667, which grant
 certain exemptions to the clergy, do it not by re-
 ference to any pre-existing privilege, but in express
 words as a new enactment. Nor is the privilege
 given limited to the clergy, but extends to other
 classes, particularly the College of Justice. The
 poll taxes, which in one instance specially, and in
 others by general expressions, affect stipendiary mi-
 nisters, may be regarded as taxes affecting stipend,
 and is one instance to disprove the existence of
 such a privilege. The expression of Mackenzie
 and Forbes, of whom even the former wrote at the
 distance of near a century from the statute 1593,
 and both of whom are very inaccurate writers, are
 much too loose to afford authority of any value ; but

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such as they are, they are by no means favourable to the plaintiff. In the other writers on Scotch Law, it is not said that any idea of such a privilege existing, or ever having existed, is to be found. There is therefore no reason to suppose it existed previously to the union. But if such a privilege had then been in existence, it must at that time have been taken away.

The treaty of union was made on the footing of equalizing as much as possible the privileges and advantages on the one hand, and the burden on the other hand, of each part of the United Kingdom. By the fourth article, as contained in the Scotch act of parliament ratifying the treaty, it was provided, “that all the subjects of the united kingdom of Great Britain shall, from and after the union, have full freedom and intercourse of trade and navigation to and from any port or place within the said united kingdom, and the dominions and plantations thereunto belonging, and that there be a communication of all other rights, privileges, and advantages, which do or may belong to the subjects of either kingdom, except where it is otherwise expressly agreed in these articles.” Then follows Article V. equalizing the right of Scotland and England, in regard to ships. Then Article VI. equalizing the customs, but containing an express provision, “excepting and reserving the duties upon export and import of such particular commodities from which any persons, the subjects of either kingdom are specially liberated and exempted by their *private* rights, which after the Union, are to remain safe and entire to them in all respects as before the same.” Article XIV.

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“ provides, that there be no further exemption
 “ insisted upon for any part of the united kingdom;
 “ but that the consideration of any exemption be-
 “ yond what are already agreed on in this treaty,
 “ shall be left to the determination of the parliament
 “ of Great Britain.” And Article XXV. the con-
 cluding article, provides “ that all laws and statutes
 “ in either kingdom, so far as they are contrary to,
 “ or inconsistent with the terms of these articles, or
 “ any of them, shall, from and after the union, cease
 “ and become void, and shall be so declared to be by
 “ the respective parliaments of the said kingdom.”
 Under these Articles XIV. and XXV. taken in con-
 nection with the others, it appears that, if a privilege
 of exemption from taxation of a public, not private
 nature, had existed in Scotland, it must necessarily
 have been held in fairness to be repealed. And this
 is the more strengthened by the consideration that in
 the act for securing the protestant religion, and pres-
 byterian church government, there is no mention
 whatever made of any privilege of the Scotch clergy
 of this nature. It is plain therefore, that while a
 variety of privileges and exemptions, both public and
 private, are secured in the treaty of union by express
 reservation, no privilege of the sort contended for
 by the plaintiff is there mentioned. And therefore,
 if it had existed, it must in equity have been held
 to be taken away. But the true inference is, that
 no such privilege existed.

For the Plaintiff in error—*Mr. Thomson*, and *Mr. Brougham*. Argued
25 March
1819.

For the Defendant in error—*The Lord Advocate*

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(*The Solicitor-General of Scotland*), and *Mr. Mackenzie*.

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In the course, and at the end of the argument, Lord *Redesdale* made the following observations :—

'The glebe and manse are not mentioned in the act of 1593. The stipend issues out of the teinds; and the act 46 Geo. III. c. 65, directs the teinds to be assessed according to their value. The language of the act appears to be a little confused. In the printed case for the plaintiff in error, it is not insisted that there is a special exemption for the manse and glebe. It is put by way of argument, that the land-tax was never charged upon the manse and glebe. But that practice furnishes no inference as to the property-tax, which is of a different nature.

30 March.

Lord Redesdale : *—Upon a fair construction of the statute 1593, it is impossible to hold that the clergy are thereby exempt from public taxes and impositions.

The recital of that statute states a grievance by "pensioners and tacksmen" having in tack, gift, or pension, the stipends of the ministers. This cannot be intended of collectors of taxes, and when it proceeds to recite that the acts of these "pensioners and tacksmen who have taken (the stipends) in "tack, gift or pension," that clearly applies to some *grant* made in the form of tack, gift or pension. Upon the recital of this grievance, of charges at-

* Upon the hearing and moving judgment in this case the Lord Chancellor was absent; the C. J. of England was present at the hearing.

tempted to be made upon the stipends, it is enacted, "that all ministers stipends in time coming be free from all tacks, pensions, *taxations* and impositions."

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The word "taxation" in the enacting clause is peculiar.

In the construction of acts of parliament as of all instruments, where general words are annexed to or follow particular words, they are taken to be of the same kind and meaning.

The words immediately following explain the sense in which the word "taxation" is used.

It is enacted that the clergy shall enjoy their stipends free from all tacks, &c. "notwithstanding any *gift or disposition* made to the contrary." This cannot be construed to allude to any public charge imposed by act of the legislature.

As to grants by the clergy in convocation, they could only bind the clergy who made the grants, not the portion allotted for stipends.

In *Grier v. Mitchell* *, there was some error in the verdict, and a *venire facias de novo* was ordered. The House of Lords thought it was a case of private right, and came under the reservation by the act of

* D. P. 27th April, 1814. The exemption claimed in this case was under an act of the Scottish Parliament, passed the 12th of July 1661, by which a coarse salt, worked and manufactured out of sea sand, by the poor inhabitants of Annandale, was exempted from the duties of excise. The proceeding was by information in the Court of Exchequer in Scotland, claiming a certain quantity of salt so made and seized as forfeited. The appellant claimed, and upon issue tried, a special verdict was given finding the facts. The Court of Exchequer, on argument, gave judgment for the respondents, and that judgment was reversed in the House of Lords.

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union. There was no finding of the law in that case. In this case, if the stipend is exempt by virtue of the act of 1593, yet the minister is liable in respect of the manse and glebe. So far, the warrant for seizure was legal, and sufficient to justify the proceedings. The finding of the jury distinguishes between the manse, glebe and stipend, and the assessed taxes, and the defender in this action could not be found guilty. But I desire to have time to look into the acts, and to consider the case.

7th April.

Lord Redesdale:—In a case of this description, where the decision affects a large body of persons, I was desirous to look minutely into the acts on which it depends.

It is immaterial to consider how the act of union might bear upon this subject. If the exemption claimed did not exist before that act, the provisions of that act cannot affect the question. The practice of not charging the stipendiary clergy of the church of Scotland, will not raise a right to exemption from charge.

What happened before the Reformation must be put out of consideration. Before the Reformation, the clergy, under the famous bull of Pope Boniface, claimed to be entirely exempt from all charges which they did not impose upon themselves. Pope Boniface carried the matter still farther, for he prohibited their imposing charges upon themselves without a licence from the pope. That prohibition was not much observed for some years before the Reformation, but it was the foundation of the exemptions claimed both in England and Scotland.

After the Reformation, the whole character of the church was changed; for the exemptions which the clergy had before enjoyed, in respect of their spiritualities, upon that event ceased. At the time when episcopacy was restored in Scotland, the archbishops and bishops formed a part of the legislature of the country. They made to the king grants for themselves as in a separate state. The lords granted for their own body, including the freeholders, who were of the same estate as the titled lords; and the burgesses made a separate grant for themselves.

After the whole property of the church had been seized, two thirds were given back to the clergy, and one third was reserved by the Crown, out of which the stipends of ministers were to be provided. The revenue was charged upon the two thirds. It probably would have answered no purpose, in point of revenue, to have charged the remaining third, which was either in the Crown or applied in the payment of stipends.

It is impossible to apply the words of the statute, as contended for the plaintiff in error. The statute 1593, exempting stipends from taxation, does not relate to personal impositions on the clergy. There may be a doubt what particular taxation is intended.

It appears that stipends, issuing out of the third of the teinds, had been charged in various ways by acts of the Crown; that is the grievance which is to be prohibited in future; and all existing charges are annulled. The word "taxation," introduced in the midst of other words, cannot be extended in construction to all kinds of taxation. According to

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the ordinary rules of construction, it must be understood in the same sense as the words with which it is coupled. Taxation in that clause must mean something of the same kind with those other things which are expressly and specifically prohibited. If this act has not the effect of exempting the clergy of Scotland from taxation of stipend, no such exemption is to be found in any other statutes. That in other respects the clergy have not been charged where other persons have been charged, furnishes no reason to extend the exemption to this case. Nor is there any ground to contend, that the words of the act imposing the property-tax are not sufficient to extend to the stipends of the clergy. By that act "*teinds, stipends, annuities, and all profits whatsoever*", are made chargeable. The party has been properly charged under the three acts specified. There can be no doubt as to the personal duties, and as to the other charges, I think the judgment ought to be affirmed.

Judgment affirmed †.

* See the words of the act *ante*, note *, p. 556.

† This question, as to the claim of the clergy to be a privileged order, in different ages of the law has been viewed in different lights. In early times, the general doctrine was, that spiritual persons, in respect of their benefices, were not chargeable as the laity, by charges imposed on the realm generally. Their goods were exempt from purveyance, 2 Inst. 3. And by the common law of England every parson was held to be free from the payment of tolls in all fairs and markets for all goods, &c. gotten upon or bought to be spent on their church livings. 2 Inst. 3; Reg. 260 a. So they are quit of pavage, pontage and murage (which were duties of the most universal obligation), and if they be distrained for, &c. may have a writ, &c. 2 Inst. 4;

Reg. Brev. 260 a; F. N. B. 227. If the sheriff or collector of tenths or fifteenths distrained them in the lands belonging to their churches, they had a like writ to discharge them. Reg. Brev. 188 a; Fitz. N. B. 176 a.

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Statutes expressed in general words, were not held to extend to the clergy, as the statute of Winton, 13 Ed. I.

Where a robbery was committed, and the hundred charged, though the words of the statute were *gentes demorantes* (all dwellers) yet the clergy were not held chargeable. See 2 Inst. 569; case of the Bishop of Coventry *semb. contra*. So the statute of highways, 2 & 3 Ph. and Mary, charges all householders, yet the clergy were held exempt. Again, the statute 33 Hen. 8. c. 2, empowers the justices to tax all "*resiants*" within the county where there is no gaol, &c. yet the clergy were formerly held not taxable. But in a case which occurred in the reign of Charles the Second, where a parson had brought an action of trespass against an officer who had taken his cows by way of distress under a warrant of a justice, and by authority of an act of the same reign, (22 Car. 2. c. 12.) requiring all *parishioners* keeping carts, &c. to assist in repairing the ways, it was held that he was a parishioner within the meaning of the act; and the court laid it down generally, that the clergy are liable to all public charges imposed by act of parliament; adding, that it had been so resolved (as Hale said) upon debate before all the Judges. So the case is reported by Ventris, 1 Vent. 273. According to the Reports of the same case by Keble, (3 Keb. 476. 507.) who states the trespass to have been by taking *horses*, and the plea in justification to have been under the 2 & 3 Phil. and Ma. c. 8. (which is enforced by 22 Car. 2. c. 12.) The words used by Hale were, "Parson is not exempt from any new charge for repairing highways; and by Hyde, C. J. in his Reports, P. 5. Ca. 1. there is no difference between clergy and laity in assesse for poor maimed soldiers or *B. R.*: but the dean and chapter and glebe must pay, and so resolved by all the Judges of England then, and so agreed by all the Judges now, being for constable rates and the like, and the parson of *B. &c.* was convicted on this very stat. of Ph. and Ma. for not sending his cart, about forty years since, and so the court conceived here." Levinz, who states the trespass to have been in taking *beasts*, (2 Lev. 132.) gives the words as used by Hale and

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the court thus: "To *new* charges by statute, the lands of the " church are subject (as other lands) unless they are excepted. Upon the stat. 22 Hen. 8. c. 5, for the repair of decayed bridges, as to the words "tax every inhabitant," Lord Coke observes, "By these words all privileges of exemptions and discharges " whatsoever, from contribution, &c. are taken away, although " the exemption were by act of parliament." 2 Inst. p. 704.

By the 43d Eliz. c. 2, clergymen are made liable to the poor rates for their glebe and tithe.

By the General Highway Act, 13 Geo. III. c. 78, s. 34, 35, 45, 46, they are expressly made liable, in respect of their tithes, &c. The 57th Geo. III. c. 99, s. 62 & 65, provides, that stipendiary curates, where the stipend appointed by the bishop equals the whole value of the benefice, and the curate is empowered to live in the parsonage, he shall be liable to all the same charges, deductions, taxes, parochial rates and assessments, as if he held the benefice.

This seems to be one of those cases in which the law has undergone a silent revolution. The general exemption of the clergy from public impositions, is acknowledged by the expression and implication of many statutes and decisions. But the privilege has ceased, in many instances, without legislative enactment, by the unseen progressive legislation of manners and opinions. The reasons for exemption as to matters of public taxation, imposed by the legislature, have been, no doubt, seriously affected by the disuse of convocations, in which the clergy were accustomed to assess their own contributions to the public charge of the state. Now they are taxed without representation as a distinct order of persons, but certainly not without vote or influence in the election of representatives.

SCOTLAND.

COURTS OF ADMIRALTY AND SESSION.

JAMES HUNTER & Co. - - - *Appellants* ;
 ARCHIBALD M'GOWN and others *Respondents*.

The statute 26 Geo. III. c. 86. relates only to ships usually occupied in sea voyages, and not to small craft lighters and boats concerned in inland navigation.

A gabbert (Anglicè a lighter,) is not "a ship or vessel" within the meaning of the statute 26 Geo. III. c. 86. s. 2.—If goods on freight are shipped on board such a vessel and destroyed by fire accidentally, or through the negligence of the master, &c. the owners, &c. are not protected by that statute, but are responsible as at common law.

As to the general liability of carriers by the law of Scotland, *Quare*.

THE respondents were owners of the gabbert Janet, a species of lighter navigated between Glasgow and the ports in the Clyde, and having a register in terms of the navigation act.

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Upon the 7th day of January 1807, the appellants shipped, at Greenock, cotton wool on board the gabbert Janet, to the value of 1,345 *l.* 16 *s.* 8 *d.* for which they took the master's receipt, acknowledging the delivery in good condition, and obliging himself to deliver the same in *Glasgow*, "in like good order, danger of navigation excepted, on being paid customary freight."

By the regulations of the harbour of Greenock, the kindling of fire on board any vessel, while in the harbour, is prohibited under a penalty. Notwithstanding this regulation, the master of the Janet

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(as it was alleged by the appellants,) kindled* a fire on board of her while in the harbour, which communicated to the vessel and her cargo. Part of the cotton wool was consumed, the remainder damaged; and a loss sustained of 572*l.* 17*s.* 2*d.*

For this sum, with interest and expenses, the appellants brought an action against the respondents, as owners of the gabbert, before the High Court of Admiralty. The Judge Admiral pronounced the following interlocutor: "Having advised, &c. finds, "that the pursuers have condescended on no law, "bye-law, fact, or circumstance which can have the "effect of subjecting the owners of the gabbert or "lighter in question, in any part of the damages "pursued for: therefore in respect of the statute "26th of his present Majesty, cap. 86†. assoilzies the "said owners, finds them entitled to their expenses, "and decerns." "Note.—This interlocutor has "nothing to do with M'Gibbon, the master."

22 Jan. 1811.

This judgment having been brought under the review of the Court of Session, the Lord Armadale, Ordinary, pronounced the following interlocutor: "Having considered the mutual memorials, and "whole proceedings in the reduction, repels the "reasons thereof; and in the suspension finds the "letters orderly proceeded, and decerns: Finds "expenses due, and appoints an account thereof to "be given in." To this interlocutor his Lordship afterwards adhered. The Appellants having presented a petition, reclaiming against these several

14 Feb. and
 7 Mar. 1811.

* It does not appear that this fact was proved; it became immaterial, according to the view taken in the judgment delivered by the House of Lords.

† See the terms of the act, *post.* p. 576.

interlocutors to the First Division of the Court, on the 16th May 1811 the following interlocutor was pronounced: "The Lords having heard this petition, refuse the prayer thereof, and adhere to the interlocutors of the Lord Ordinary."

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Against these interlocutors of the Judge Admiral on the 1st of January, 1808, of the Lord Ordinary on the 22d January, 14th February, and 7th March 1811, and against the interlocutor of the First Division of the Court of Session of the 16th May 1811, this appeal was presented to the House of Lords.

For the Appellants:—*Mr. Wetherell*, and *Mr. Adam*.

Carriers of goods by sea or land are bound to make good all loss or damage sustained on goods entrusted to them, unless such loss or damage is produced by the act of God, or the King's enemies.

It is argued that the loss claimed was occasioned by fire; and by the 26th of the King, cap. 86, owners of ships or vessels were exempted from loss arising from fire on board such ships or vessels. But it is plain, as well from the preamble as from the enacting clauses in the statute, that it is applicable to ships and vessels employed in general commerce, and not to craft employed in transporting goods upon canals and navigable rivers.

It requires a large capital to fit out a ship of considerable size for sea, and it was a great discouragement to invest money in this way, that when owners were, by accidental fire, deprived of their own property, they were liable to others for the value of such property as might at the time be on board their vessels. To remove this discouragement, which was

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supposed to operate against the increase of our shipping, was the declared object of the Legislature in passing the statute in question, and similar motives have induced the Legislature to pass several other acts for the relief of ship owners. But had it been the intention of the Legislature to extend this statute to common carriers by water, the same policy must have induced them to extend it to carriers by land also; in so far as the fitting out a waggon of the first class, with a suitable team of horses, requires the investment of a larger sum of money, than fitting out a gabbert, flat, or lighter, of the first class; and the same observation applies to waggons and gabberts of smaller dimensions. When, however, it is considered how many millions worth of property is annually transported by means of inland navigation, and how very much the safety of that property depends upon the judicious selection of servants to conduct it, owing to the continual opportunities such men have of neglecting their duty, it can never be supposed, that if the legislature had intended to release, to so very great an extent, the responsibility of common carriers, it would have been left to courts of law to have made this out by implication.

If there was at any time room to doubt the intention of the legislature in passing the act, it is now removed; for in an act passed in the 53d Geo. III. cap. 159, for the farther relief of ship owners, and for amending the act of the 26th Geo. III. *and in which the same precise terms are used to describe the persons for whose benefit the act is passed, it is expressly provided by "sec. 5th, that nothing herein " contained shall extend, or be construed to extend,*

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“ to the owner or owners of any lighter, barge, boat;
 “ or vessel of any burden or description whatsoever,
 “ used solely in rivers or inland navigations, or any
 “ ship or vessel not duly registered according to law.”

Although the act of the 26th Geo. III. had extended to the owners of gabberts or lighters, it would have been altogether inapplicable to the present case. For, as by the regulations of the harbour of Greenock, made under the authority of an act of parliament, the kindling of fire on board of vessels in the harbour is prohibited, there is therefore an implied contract between the owners and masters of all vessels, and the shippers of goods on board of such vessels, that fire shall not be unlawfully kindled, while such vessels remain in the harbour; and as the loss in the present case can be directly traced to the breach of this contract, the respondents would not be entitled to shelter themselves under an act of parliament, intended only to protect innocent sufferers from extraordinary loss by accidental fire.

For the Respondents:—*Sir Samuel Romilly*, and
Mr. ———

The defence is founded in this case entirely on the clause in the act of parliament of the 26th Geo. III. cap. 86, s. 2. which is an effectual bar to the appellants claim. This clause is in the following terms:
 “ And be it further enacted by the authority afore-
 “ said, that no owner or owners of any ship or
 “ vessel shall be subject or liable to answer for, or
 “ make good to any one or more person or persons,
 “ any loss or damage which may happen to any
 “ goods or merchandize whatsoever, which from and

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" after the 1st day of September 1786, shall be
 " shipped, taken in, or put on board of any such ship
 " or vessel, by reason or means of any fire happen-
 " ing to or on board the said ship or vessel."

When the words of an act of parliament are ambiguous or equivocal, an inquiry may be made into the objects of the legislature in passing the act, for the purpose of ascertaining its meaning. But when the language of a statute is clear and intelligible, it is altogether incompetent to refuse effect to the enactment by reference to any supposed views of the legislature in making the law. In this instance it cannot be said that there is any ambiguity in the clause, unless the appellants can make out that a gabbert is NOT a *ship* or *vessel*.

The express object of the statute as set forth in the *preamble*, is, "to promote the increase of the
 " number of ships and vessels, and to prevent any
 " discouragement to merchants and others from being
 " interested and concerned therein, which is likely to
 " happen from the responsibility to which they are
 " now exposed." It is clearly within the policy of the act, that the provision should extend to gabberts. It is certainly an object of policy to increase the number of such vessels. Seamen may be both trained and employed in such vessels. In truth, the men who navigate them, might be, and frequently have been, of the most essential service on the coast of the Clyde. Besides, an establishment of lighters is necessary to support the trade and business of larger vessels. And therefore it would be peculiarly inexpedient to impose such a responsibility on the owners of gabberts as would discourage them from

entering into this species of trade, and throw the transport of goods from place to place into the hands of land carriers.

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In the next place, the owners of gabberts stand in as much need of this protection from the statute as the proprietors of larger vessels. If the act was intended, as it unquestionably was, to protect the owners of vessels from a heavy responsibility on account of the inattention and negligence of their servants, the benefit of it must be given to every owner whose vessel is not actually under his own charge. The accident by which a vessel is set on fire must always happen in a moment. But an owner residing in Glasgow, while his gabbert is in Greenock, Dumbarton, or at many miles distance from him, has plainly as little control over the master or crew as if the ship were in the West Indies.

The regulation of the magistrates of Greenock could not (in whatever terms it had been conceived) alter the enactments of a public statute ; and, in the present case, merely imposed a small pecuniary penalty upon the master in case of non-observance.

The *Lord Chancellor*, after having stated the facts and the pleadings in this cause, as before set forth, proceeded thus :—

12 July 1819.

Several points were argued in this case ; first, what was the law of Scotland with respect to the liability of carriers in general ? In the next place, that whatever might be the liability of carriers in general, the regulations, with respect to the harbour of Greenock, which prohibited the kindling of any fire on board any vessel, would make the owner of

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any gabbert liable, whatever might be the liabilities, according to the general law of Scotland. The decision proceeded expressly upon the supposition that the statute of the twenty-sixth of his present Majesty had exempted the owners of this sort of craft, as falling under the denomination of a vessel, from damages, in respect of the loss sustained. There was a great deal of argument at your Lordship's bar, upon the meaning of that statute of the 26th Geo. III. and after hearing that argument, it was conceived, that it was a case in which it might be proper to have the assistance of his Majesty's Judges, and to have it argued before them. The case has therefore stood over a considerable time ; but it has been found utterly impossible, such is the pressure of business on the Judges in the Courts below, to procure their attendance upon this cause. I have, however, looked very anxiously into the acts of parliament on this subject, and I have had the assistance (though not of all the Judges,) of the Chief Justice of the King's Bench, who happens, in the course of his practice, to be particularly conversant with the meaning of this act of parliament, relating to ships and vessels, and I have no hesitation in saying, that I am of opinion, that that act of the twenty-sixth of his Majesty, cap. 86, relates only to ships and vessels usually occupied in sea voyages, and that it is not an act of parliament which gives protection in case of small craft, lighters, and boats, and so on, concerned in inland navigation. The result is, (if that is a right opinion, and I really do not entertain any doubt about it), that if the judgment in the Court below has proceeded upon the supposition that this

statute protected the persons against whom the claim of damages was made, from being liable as owners of a gabbert, in that respect this judgment must be considered erroneous.

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There remains behind, the question, what is the extent and nature of the liability of Scotch carriers? Our law, with respect to English carriers, cannot decide that, nor the point how far the regulations of this particular harbour of Greenock, would make the master or owner of a vessel liable. It appears to me that the right course will be, to find that the gabbert or lighter called the Janet, mentioned in the pleadings in this cause, is not to be considered a ship or vessel, within the intent and meaning of the statute of 26th Geo. III. cap. 86, and with that finding, to refer the cause to the Court of Session, to review the interlocutors complained of, and to do what is just and right, consistent with this finding; that will enable the Court of Session to find, whether, by the law of Scotland independent of this statute, or any regulation relating to the harbour of Greenock, it will come to a different result.

Die Luna, 12^o Julii 1819

The Lords find, that the gabbert or lighter, the Janet, mentioned in the pleadings in this cause, is not to be considered as being a ship or vessel, within the intent and meaning of the statute of the twenty-sixth of his present Majesty, cap. 86. And it is ordered, That with this finding, the cause be remitted back to the Court of Session in Scotland, to review the interlocutors complained of, and to do therein as may be just, and as is consistent with this finding.

ENGLAND.

IN ERROR FROM THE COURT OF KING'S BENCH.

WILLIAM EYRE - - - - *Plaintiff in Error.*

THE GOVERNOR AND COM-	} <i>Defendants in Error.</i>
PANY OF THE BANK OF	
ENGLAND - - - -	

In actions upon bills of exchange, containing counts in contract upon the bills, and a separate count for interest, not expressed to be by contract, but apparently sounding in damages, if the plaintiff obtain interlocutory judgment upon demurrer to the replication, it is not necessary that the damages should be assessed by a jury. The Court, on motion of course, may refer it to the Master to compute, or without reference may itself compute the damages in respect of interest; and the plaintiff may enter up judgment, upon the respective counts in contract and for interest, without *remittitur* as to the excess of the aggregate sums laid in those counts beyond the sum of principal and interest computed, and for which he enters up judgment.

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THIS was an action brought in the Court of King's Bench by the defendants in error, against the plaintiff in error, upon two bills of exchange. The declaration consisted of seven counts: the first, on a bill of exchange for the sum of 973*l.* 4*s.*; the second, on a bill of exchange for the sum of 1,278*l.* 13*s.* 6*d.*; the third count was *indebitatus assumpsit* for 2,500*l.* for money lent and advanced; the fourth, *indebitatus assumpsit* for 2,500*l.* for money

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paid, laid out and expended; the fifth, *indebitatus assumpsit* for 2,500 *l.* for money had and received; the sixth, *indebitatus assumpsit* for 300 *l.* for interest; and the last, *indebitatus assumpsit* for 2,500 *l.* for money due on the balance of an account stated. The defendants in error obtained interlocutory judgment in the Court below, on demurrer to the replication; and after an assessment made under a reference to the Master by order of the Court below, and without the intervention of a jury, entered up judgment, on the first, second and sixth counts, for the sum of 2,299 *l.* 9 *s.* 3 *d.* damages, and 56 *l.* 0 *s.* 9 *d.* costs, remitting all damages on the third, fourth, fifth and last counts of the declaration. Against this judgment a writ of error was brought upon the following grounds; first, that the different sums claimed by the two first and sixth counts of the declaration, upon which the judgment was taken, amounted to the sum of 2,551 *l.* 17 *s.* 6 *d.* whereas the judgment was only taken for 2,299 *l.* 9 *s.* 3 *d.* leaving a sum of 252 *l.* 8 *s.* 3 *d.* parcel of the several sums claimed by the said two first and sixth counts of the said declaration, without any adjudication whatever; whereas the defendants in error (the plaintiffs in the Court below) ought either to have taken judgment for the whole of the sums mentioned in the three counts upon which they have taken judgment, or have entered a *remittitur* as to the balance, as they have done as to the third, fourth, fifth and last counts of the declaration, or have released such balance: so that if this judgment be not erroneous, there is nothing to prevent the defendants in error from bringing a new action for

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the sum of 252*l.* 8*s.* 3*d.* and subjecting the plaintiff in error to the costs of such new action. Secondly, that as the sixth count of the declaration is not founded upon any written instrument or express contract, but sounds in damages only, such damages ought to have been assessed by a jury, and that the Court below had no authority to assess the same without the consent of the plaintiff in error, the defendant in the Court below.

For the Plaintiff in error, *Mr. Denman.*

Every judgment given in a court of law ought to be final and conclusive between the parties, as to all matters which appear to be in dispute, and claimed by the party suing in the action in which such judgment is given; but the judgment given in this case in the Court below is not final and conclusive as to the matters which appear, by the pleadings in this cause, to have been in dispute between the parties in this suit; but on the contrary, a sum of 252*l.* 8*s.* 3*d.* which appears to have formed part of the matters in dispute between the parties in this cause, remains undisposed of by the judgment.

Although the Court below might have assessed damages on the two first counts of the declaration, they being and appearing to be upon contract by written instruments, and for the payment of specific sums of money, it had no power to assess damages of its own authority, and without the intervention of a jury, upon the count of the declaration which sounds entirely in damages.

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For the Defendants in error, *Mr. James Parke*
and *Mr. Winter*.

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The count for interest may be by contract, for any thing that appears in the declaration. The question is, whether the Court below has the power to assess damages for interest without inquiry by a jury? That they have such power generally, appears by many authorities; inquiry is only to inform the conscience of the Court. The plaintiff in error *confounds the power with the practice* of the Court. In *Holdipp v. Otway*, 2 Saund. 106, it was decided to be the course of the King's Bench, in an *action of debt*, where the plaintiff has judgment by default or confession, to *tax* the damages for the detention of the debt, as well as the costs, and that interest may be included in the damages. In the note to that case by Serjeant *Williams*, the subsequent authorities are collected; and upon the ground of those authorities the practice has been established. The last case was in the Exchequer Chamber, 4 Term Rep. 148, *Gould v. Hammersley*. Upon interlocutory judgments, the Court will grant an order of reference to the Master to compute interest, in cases similar to the present.

In reply :

The defendants in error might have had damages for interest; they need not have taken judgment on the count for interest, or they might have entered a *remittitur* on that count.

During the argument the Chancellor expressed some doubts as to the practice, and put the following

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case: Suppose the declaration had consisted of one count for 100*l.* for interest only*, and after *non assumpsit* pleaded, there had been judgment by default, could the damages in such case have been assessed by the officer of the Court? The counsel for the defendant in error answered, that in such case the Court might refer it to the officer to compute the interest.

On the 8th of July 1819 the judgment of the King's Bench was affirmed, without observation.

* See the dictum in the *Anon.* case, 1 *Ventr.* 330. (cited *post.* 599.) which seems to warrant the doubt expressed by the Lord Chancellor, unless the practice can be sustained upon something less assailable than the extensive authority of ancient precedents. The certainty of the demand is the criterion suggested by that case. Upon the ground (as stated in the report), the Court in that case observed, that the damages being uncertain, could not be set in a court of equity, *but by a jury*; and as to their own powers to assess damages on judgment by default, they took a distinction between actions of *debt*, where the *demand is certain*, and actions of trespass or upon the case, where the matter lies *wholly in damages*. In the former case they said the Court had such power, but not in the latter.

If, therefore, the action, in the case put by the Lord Chancellor, can be said to lie wholly (*i. e.* substantially) in damages, the Court, according to the authority of this precedent, has no power to assess the damages. If it is in a technical sense only nominally, and not substantially, that the action is said to lie in damages, being in fact in the nature of an action of debt (*in deb. assumpsit*) for a sum certain, or which becomes certain by mere computation, then the power of the Court is founded upon the certainty of the demand, as contradistinguished from a demand which lies wholly in damages.

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THE first ground assigned for error was but slightly noticed in the argument for the plaintiff in error, and the counsel for the defendants in error merely asserted that there could be no *remittitur*.

The principal and interest, for which judgment is entered up, exceed the amount of the sums laid in the two first counts. If, therefore, the damages for interest could not be taken under the general breach, at the close of the declaration, (which was not suggested in argument,) and if the Court had no power to assess damages on the count for interest, the course, it seems, would have been to enter a *nolle prosequi* upon the count for interest, and a *remittitur* of all damages assessed beyond the amount laid in the two first counts*. But the Court having power to assess damages on the count for interest, then it is similar to the common case, where the jury give less than the damages laid in the declaration, in which case no *remittitur* is ever entered for the excess. It is only in cases where the jury give larger damages than the plaintiff has claimed by his count, that a *remittitur* is required, as † where damages were laid at 10*l.* in the declaration, and the verdict was for 13*l.* the judgment was reversed: But the Court said, that if the plaintiff had released the excess of damages beyond the sum laid in the declaration, and entered up judgment accordingly, that would have been good ‡. So where several damages were assessed against the defendants, it was held in judgment that the plaintiff might enter a *remittitur*, or take judgment *de melioribus damnis*, which operates as an election of the greater and waiver of the lesser damages §.

* Tidd's Prac. 589; 2 Smith's Rep. 46-7 in notis.

† *Percival v. Spencer*, Yelv. 45. The jury may give less damages than laid in the declaration, but not more. Dict. of Lutwyche, in *Fairly v. Roche*, Lutw. 274.

‡ *John and Robinson v. Dodworth*, Cro. Car. 192, and *Salin v. Long*, 1 Wils. 30.

§ See also *Wray v. Listel*, 2 Stra. 1100.

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The second point was argued, and *apparently* decided upon the authority of *Holdipp v. Otway*, and the precedents cited in the note to that case by the late learned editor of Saunders. But the jurisdiction asserted in that case and the notes, is much larger than required for the decision of the case now reported, and extends far beyond the modern practice of the Courts. According to that case and the notes, the Court has unlimited power in actions of *trespass* and *assumpsit*, as well as covenant and debt, where judgment is taken upon demurrer, by default, confession, &c. to assess the damages, with the assent of the plaintiff, if they think fit. The writ of inquiry is said to be merely gratuitous, to inform the conscience of the Court, and the Judges may dispense with that information, from pre-knowledge or other cause, or at discretion. This doctrine is rested upon ancient authorities, which if now to be considered as law, warrant the proposition to the full extent in which it is stated, and other authorities are not wanting to carry the doctrine to the extreme of uncontrolled jurisdiction, as to the power of assessing damages without the interference of a jury in all actions where the defendant does not take issue on the facts and conclude to the country, and in cases of assault, mayhem and trespass, of increasing and abridging damages after a verdict.

In the argument for the defendant in error, the practice of the Courts is said to be *confounded with their power*. The proposition is a little obscure; but it may be conjectured from the authorities cited in the argument, that it was intended to intimate, that the powers of the Courts are much more extensive than might be supposed, from the limits within which the Judges have in practice bounded their jurisdiction. It is therefore highly material to ascertain the boundaries of these dormant powers, as they are supposed to exist upon the authority of ancient precedents. If the cases cited in the note to *Holdipp v. Otway*, as suggested by the argument, are

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authorities for the power as distinguished from the practice, then in trespass for breaking and entering a dwelling-house, accompanied with circumstances of great aggravation*, where judgment passes by default, or confession, or upon demurrer, the Courts have power to assess the damages; and if they have such power in trespass, there seems to be no reason why the power should not be universal.

The law of England, where it is not regulated by statute, stands upon the decisions of the Courts; and it is a point of the highest consequence to the subject, to be able to distinguish, among ancient precedents, which have the force and authority of law, and which have fallen into abeyance by disuse.

The practice of the Courts is adapted to the convenience of suitors, and is perfectly understood. But it is suggested that there is a latent undefined power, not to be confounded with, and therefore not controlled or abrogated by this practice. If such a power exists, it may be exercised. It is therefore expedient for those who are concerned in the administration of justice, to inform themselves as to the extent of this impending power, and the authorities upon which it rests.

In *Holdipp v. Otway*, an action of debt was brought upon a bill obligatory. Error was assigned, that the Court had taxed damages, on occasion of the *detention of the debt*; but it was decided, that upon a judgment in *debt* by default, such damages might be so taxed with the assent of the plaintiff. The cases cited by the learned editor are, *Bruce v. Rawlins*, 3 Wils. 61, 62, which contains the dict. of Wilmot, C. J. on judgment by default in *trespass for breaking, &c.*; *Hewitt v. Mantell*, 2 Wils. 372-4. dict. of same Judge upon *assumpsit*; *Thelluson v. Fletcher*, Doug. 316, dict. of Buller, J. as to actions upon *covenant* for payment of a sum certain; *Blackmore v. Fleming*, 7 T. R. 446-7, where in an action of debt, Lawrence, J.

* See *Bruce v. Rawlins*, 3 Wils. 61, 62, post. 591.

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said it was at the option of the plaintiff to refer it to the Prothonotary to tax interest by way of damages, or to have a writ of inquiry of damages; *Roe v. Apsley*, 1 Sid. 442; where upon a judgment of debt, after some doubts raised by the Chief Justice, an order was made in the Court of Common Pleas, referring it to the Secondary without a writ of inquiry to tax damages; 11 H. 7. 5, 6; Bro. Default, 105; 1 Roll. Abr. 571-3; *Ognell's case*, 3 Leon. 213; and in actions on the case upon promissory notes, where judgment passed by default, *Rushleigh v. Salmon*, 1 H. Blac. 252; *Andrews v. Blake*, Ib. 529; *Longman v. Fenn*, Ib. 541; and *Shepherd v. Charter*, 4 T. R. 575, where the same practice prevailed.

These are the cases cited in the note upon *Holdipp v. Otway*, and they seem to be confirmed by *dicta* and practice in other cases.

In the case of *Sir Francis Goodwin v. Welsh and Over*, Yelv. 151, upon a declaration *in trespass for goods taken*, concluding for damages, *non sum informatus* pleaded, and judgment for plaintiff, the damages were assessed by a jury upon writs of inquiry; and upon motion to prevent filing the writ, because the property in the goods was not proved on the inquiry, the Court held that the value only was material to be proved, according to the requisition of the writ; and they added, *that they themselves as Judges, if they so pleased in these cases, might assess damages without directing any writ of inquiry*, for the writ issued only *quia nescita quæ damna*; but if the Judges will trouble themselves with the assessment of damages, they have the power to do so.

So in actions of debt on a judgment, and for damages *pro detentione debiti*, the jury or the Court assess interest on the sum recovered by the first judgment, up to the time of the judgment in the new action; as in equity it is computed to the time when it is supposed the Master's report will be confirmed.

In *Mallory v. Jennings*, Fitzg. 162. it was held that

the omission of a writ of inquiry after judgment by default, was cured by the statute for the amendment of the law 4 Anne, c. 16. s. 2. See also the Year Books, 14 H. 4. 9; 3 H. 6. 29; 19 H. 6. 10; *Green v. Hearne*, 3 T. R. 301; 2 Stra. 1145; *Dufroy v. Johnson*, 7 T. R. 473.

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According to these authorities, consisting of decisions as to the action of debt, and the dicta of Judges in cases of trespass and other actions, the power of the Courts, as distinguished from their practice, appears to extend to actions of assumpsit and *trespass*, as well as debt for a sum certain.

In *Bruce v. Rawlins*, (which is one of the cases cited in the note to *Holdipp v. Otway*), the action was for a violent trespass committed by custom-house officers, who wantonly entered the house of the plaintiff, broke open his boxes and drawers, and caused great alarm to his wife and family. After a verdict upon a writ of inquiry, application was made by the defendant for a new writ. Upon that occasion, Wilmot, C. J. said, "This is an inquest of office to inform the conscience of the Court, who, if they please, may themselves assess the damages."

If this *dictum* is not to be questioned, the power must be still further distinguished from the practice; for by other cases, not cited in the note to *Holdipp v. Otway*, nor in the argument of the case now reported, but of equal efficacy in point of authority as precedents, the jurisdiction is extended to almost every species of civil action; and if the authority of old cases will justify the exercise of such a power, similar authorities might warrant the exercise of powers by the Courts to diminish or increase damages after a writ of inquiry executed, and even after a verdict given by a jury upon trial of an issue.

The early reports furnish many precedents to show that damages assessed upon a writ of inquiry may be increased or abridged at the pleasure of the Court. Two reasons are given—First, "For that as the Justices might

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have awarded damages without the writ of inquiry, the inquisition thereupon is nothing more than an inquest of office for their information."—Secondly, Because an action of attainr does not lie against the jury on account of the damages assessed upon a writ of inquiry. 14 H. 4. 9; 3 H. 6. 29; Bro. Abr. Dam. pl. 7; 19 H. 6. 10.

Upon the same principles it was held, that if the plea be sent to be tried in a foreign county, damages might be increased by the Court, because the jury there have not full knowledge of the fact. 1 Rol. 572. l. 50. So in account, 10 H. 6. 24 b. and in debt upon obligation, 1 Roll. Abr. 572. l. 50. It was held also, 1 Rol. 573. l. 5, that where the Court may assess damages without a writ of inquiry, they may increase them after a writ of inquiry, upon demurrer, or judgment by default, or upon the view of any Justice of the Court in *pais*, 1 Roll. 572. l. 22; and where they can increase, they may mitigate damages. 1 Roll. 572. l. 25, 28; 573. l. 7.

These doctrines, and most of the examples of the power of the Court to increase and diminish damages, are collected and stated by C. B. Comyns, in his Digest, tit. *Damages*, as existing law. In other sections of the same title (*Damages*, E. 1 & 2) he states the law (so far as appears, upon his own authority or experience,) with this distinction:—"In all cases where the issue is tried by a jury, and damages are recoverable, the damages ought regularly to be assessed by a jury; if they do it not where damages *only** are recoverable, the verdict shall be void; but where there is judgment without any issue tried, damages shall be assessed by the Court, or by a writ of inquiry." In the doctrine, as thus qualified by Comyns, it does not distinctly appear how far it is in the option of the Court either to issue the writ of inquiry, or in every species of action where there is judgment without issue tried, to assess the damages themselves.

In actions for battery, amounting to mayhem or tres-

* See the dict. *Anon.* 1 Ventr. 330. *post.* 599.

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pass for a great wound, and even common trespass, the Courts not only after assessment upon a writ of inquiry, but even after a verdict limiting the damages, have exercised a power of abridging or increasing the damages. Their powers, therefore, as distinguished from their practice, if ancient authority stands unaffected by disuse, is much more extensive than the argument for the defendant in error supposed or contemplated.

In Jones's Rep. B. R. 183, it was held that the Judges, even of inferior Courts, have the power to increase the damages upon a view of mayhem; although Justices at Nisi Prius were held to have no such power. 1 Roll. Abr. 573. pl. 1. In a series of cases, extending from the Year Books to the reign of Geo. II. it was held, that the Judges of the superior Courts, having before them a certificate of the evidence indorsed upon the postea by the Judge before whom the issue was tried, and upon report, if tried, by one of the Judges of the Court, and a view of the wound, may increase the damages assessed by the jury; Bro. Dam. pl. 47; 1 Roll. Abr. 572. pl. 8; *Cook v. Beal*, Ld. Raym. 177; and even without view, if a Justice of the Court in which the action is depending has had a view and reports. Bro. Dam. 49; 1 Roll. Abr. 572. pl. 9.

It is said also, admitting that the Court have no direct power, yet even *in trespass*, if the damages assessed by the jury are excessive, the Court may stay judgment until the plaintiff enters a remittitur as to part, or releases them, and reduces the damages to a reasonable sum. Bro. Dam. pl. 7; Bro. Judges, pl. 22; and the Year Books *qua supra*.

In a great variety of other cases, the Courts have exercised the power, directly or indirectly, of reducing or increasing the damages after inquiry, or verdict by a jury. In trespass for taking goods after verdict for 20*l.* they increased them to 40*l.* 1 Roll. Abr. 572. pl. 1. So in cases of mayhem, the power has been exercised frequently, and without hesitation; as in 1 Roll. Abr. 573, upon appeal of mayhem, the damages assessed by the

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Jury, at 20 marks, were, upon view and information of surgeons, increased to 100 *l.* In another action, the verdict being for 18 *l.* at the day in Bank, the plaintiff showed the mayhem in Court, and prayed an increase of damages; and they were increased to 40 *l.* Bro. Dam. pl. 86; 39 Ed. 3, 20. In trespass for cutting off a right hand, the damages upon view were increased from 50 *l.* to 100 *l.* *Tripcony's case*, Dyer, 105. For a thumb cut off, they were increased from 40 *l.* to 100 *l.* *Mallet v. Ferrers*, 1 Leon. 139. In trespass for a wound in the hand, upon affidavit of a surgeon, and certificate of the Judge who tried the cause, that it was the same wound as alleged and proved at the trial, the damages were increased. Latch. 223. For a broken arm the Court refused to increase the damages, because the manner of the beating was not set out. Sty. 345. So it is said, unless the Judge certifies, or there is proof that the wound is the same for which the action is brought, the Court may refuse. 1 Sid. 308. But where battery and mayhem were alleged, though the manner not set out, the damages were increased from 10 *s.* to 40 *l.* Hardres, 408. by Hale, C. J. For the loss of two fingers, upon a view, the damages were increased from 5 *l.* to 100 *l.* Freeman, 173. The Court refused to increase the damages, where the word *maihemavit* was omitted in the declaration. 1 Vent. 327. *Semb. contra* Hard. 408. But the doctrine was overruled in *Cook v. Beal*, 1 Ld. Raym. 176, where it was said to be sufficient, if, by the description, the wound appears to amount to mayhem, or even if it amount to a corporal hurt which is apparent. In that case it is stated that the plaintiff had nearly lost the sight of one of his eyes.

The most modern case, in which such a power has been exercised, is *Burton v. Dynes*, Barnes, 153. It was an action for an assault, battery and mayhem. On the trial a verdict was given for the plaintiff, damages 11 *l.* 14 *s.* In Mich. term, 7 Geo. II. the Court was moved to

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increase the damages. A rule to show cause was granted, and upon view of the party, examination of a surgeon, *ore tenus* in open Court, and hearing counsel on both sides, the damages were increased by the Court to 50*l*. In *Theale v. Vaughan*, 1 Wilson, 5. 16 Geo. II. upon a similar application in a similar action, the Court refused to increase the damages; but Lee, C. J. said, "There is no doubt the Court can increase the damages in this case upon view of the party maimed."

These are decisions and dicta too recent, perhaps, to permit us to consider the law as entirely obsolete or abrogated by disuse: and in a recent book of practice, (Tidd, p. 903.) which the practitioners at common law are accustomed to quote, (and justly) with the highest respect, this doctrine, as to the power of the Court to increase the damages upon a view, &c. in mayhem, is stated as existing and unabrogated law. The counsel, for the defendant in error, in arguing the case now reported, seem to have had in theory some sort of basis to ground their suggestions as to the powers of the Court, since decisions upon this head, and judicial assertions of law, are yet standing unimpeached on the records of the Courts, and no otherwise affected as rules of law, than by modern disuse, and the adoption of a new practice.

If ancient authorities, therefore, selected partially or taken promiscuously, are to decide what are the powers of Judges to assess, abridge or increase damages, those powers, according to theory and former practice, appear to be alarmingly extensive; for the decisions above cited show that the Court, or a Judge, in the special cases stated, after a writ of inquiry, or after trial and verdict, may, upon examination and view, without further trial or a new writ of inquiry, increase the damages assessed upon the former trial or inquiry. The law is undoubtedly so existing, if ancient authority and assertion of authority are sufficient to sustain such a jurisdiction, or unless it can be maintained that those authorities are contradicted by better precedents, either of decisions upon the

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points at issue in those cases, or principles stated by the Judges who decided them; or finally, unless those extraordinary powers have been abridged by contrary practice or lost by disuse.

If we are to consider the practice as distinguished from and controlling the power, the jurisdiction of the Courts to assess damages, has, for a great length of time, been confined to cases where the demand of the plaintiff in the action is certain, or depending upon a mere computation of figures. In all other cases damages are assessed upon writ of inquiry, where the defendant does not take issue on the facts. Where by the form of pleading, the action is brought to a trial, and a verdict given; from the reign of George the 2d, (and early in that reign) it has been the practice of the Courts to grant a new trial if the damages appear to be excessive; and where the damages are alleged to be too small, it is said to be a settled rule with the Courts not to grant a new trial, except under very special circumstances, as mistake of law by the sheriff or jury, miscalculation, &c. See *Mauricet v. Brecknock*, Doug. 491; *Markham v. Middleton*, 2 Stra. 1259; *Woodford v. Eades*, 1 Stra. 425. 1 Chitty's Rep. 644. & 729; 2 Chit. 219. In the course of the last ninety years, there is no recorded instance of any exercise of power by the Courts to increase or abridge the damages assessed by a jury upon verdict or writ of inquiry. And in a modern case, the Court of King's Bench has refused to alter verdict to increase the damages in respect of interest upon a promissory note. *Du Belloy v. L. Waterpark*, 1 Dowl. & Ryl. 16.

How far the authority of ancient decisions has been affected by desuetude, it might be hazardous to assert. The decisions in *The King v. Woolff*, 2 B. & A. and other recent cases which might be cited, are sufficient to show that mere disuse furnishes no ground to infer that ancient decisions are obsolete. Contrary practice, and the frequent refusal of the Courts to exercise the powers, put the matter on a different footing.

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If neither disuse, nor long practice, nor the self-denial of the Courts, has been sufficient to affect the right to exercise these singular powers, it becomes expedient to examine the precedents upon the authority of which the right is supposed to rest, and the power as distinguished from the practice of the Courts.

The decisions are various in their character, and to a certain extent, inconsistent with each other. The question then occurs, whether any consistent principle of jurisdiction can be extracted from the decisions, notwithstanding this apparent discordance. The doctrine that the Court, with the assent of the plaintiff, has the power to assess the damages where there is judgment upon demurrer, by confession, default, &c. seems to rest upon a principle of pleading. In the case of judgment by default, as the defendant does not, by pleading to issue upon the facts, appeal to the decision of a jury, he is supposed to acknowledge, or not to controvert, the demand of the plaintiff, as stated in his declaration; and when he takes issue upon the law by demurrer, he admits the facts, and among the rest the damages laid in the declaration, to the whole of which, in theory of law, the plaintiff may be considered as entitled. But if the plaintiff assents to a fair estimation of his damage (which by many authorities is held to be an indispensable condition), the Court may assess the damages by their own judgment, or direct a writ of inquiry to issue. This is stated to be the conclusion of law, where the defendant *confesses the action*. 1 Roll. Abr. 578, pl. 6, referring to 29 Ed. 3. 13; Bro. Dam. pl. 25. So it is laid down by ancient authorities, that if there be judgment upon demurrer the justices may award damages without a writ of inquiry. Bro. Dam. pl. 194, referring to 14 H. 4. 39, 40. And upon a plea in justification of a rescous, damages to a certain amount having been alleged in the declaration, judgment was given for the plaintiff upon demurrer to the plea, the Court deciding that the plaintiff

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was entitled to the damages alleged, *because the defendant did by his plea confess the trespass, and did not deny the damages to be as alleged.* 1 Rolle's Abr. 578. pl. 4, 5; 21 Ed. 3. 4 b. & 40 b. In some cases, however, the Courts, even in ancient times, have refused to act upon this principle, where the action was of such a nature as to make the claim of the plaintiff to damages a matter of opinion. See Bro. Dam. 55, 56. This principle of pleading seems, therefore, by the authority of many cases, to have been so far qualified, that the plaintiff was compelled by the Courts to waive his theoretical damages in cases where the inquiry and compensation were matter of opinion, and to submit the estimation of the real damage suffered to the decision of a jury, or the judgment of the Court.

Upon a careful examination of the ancient precedents, it will be found, that with the exception of the cases of assault, battery and mayhem, the jurisdiction of the courts to assess damages in actions where the damages are uncertain, has been exercised with much doubt and hesitation; and the right to such jurisdiction has not, unfrequently, been denied by the Judges.

Notwithstanding some decisions and many sayings to the contrary, it might, perhaps, without much hazard, be asserted, that the sound principle to be extracted from the best of the old authorities is, that *the certainty or uncertainty* of the plaintiff's demand, arising out of the nature of his declaration, and appearing upon the record as to the amount of damages, are the true tests by which the question is to be decided, whether the Court may assess the damages, or whether the case must be referred to a jury. That such a principle existed and was acknowledged in early times, appears distinctly exemplified by the following cases.

In the Year Book, 10 H. 6. 24 b. 84, it is said, damages may be increased by the Court, where the principal demand is *certain*, as in account; so in debt upon an obli-

gation where the deed is denied. 1 Roll 572; 14 H. 4. 19 b.

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In an action of debt for foreign money, which was averred to be of a certain value, a verdict was given for the plaintiff, but no damages were assessed. The Court awarded a writ of inquiry; and gave, as their reason, that the value of foreign money is no more known to the Justices than the value of twenty quarters of wheat would be. But they said, that if the action had been for money current, they might have awarded damages without a writ of inquiry, the value of current money being known to them. *Bagshaw v. Playn*, Cro. Eliz. 536.

In another case, (*Anon.* 1 Ventr. 330.) where application was made to the King's Bench for a prohibition to restrain proceedings in the Marches by English bill, to recover upon the promise of the defendant to pay the debt of a stranger, being in the nature of an action upon the case; notwithstanding a custom alleged, and the reservation of such customs by the stat. 33 H. 8, the prohibition was granted, upon the ground that where damages are *uncertain*, they cannot be set in a Court of Equity, *but by a jury*; and upon that occasion it was said by the Court, that if there be judgment by default in an action of debt, the Court, as the *demand is certain*, does sometimes award damages without a writ of inquiry, *but never in actions of trespass or upon the case*, because these two actions will lie *wholly* * in damages.

So it has been decided, that in all actions where the demand of the plaintiff is *certain*, as an action of debt, the damages assessed by the jury, who tried the issue joined in the action, may be increased by the Court. Bro. Dam. pl. 137. 139; Bro. Costs, pl. 28.

In *Thorngate v. Reeve*, 29 & 30 Eliz. B. R. cited in a note to Dyer, 105 a. it is said, if in debt on bond, &c. the jury give no damages, the Court may assess the

* See Comyns Dig. *quod supra*, p. 592.

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damages, because *the debt is certain* and the plaintiff's loss apparent.

In other cases where the demand was uncertain, the power of the Court to assess damages has been denied upon the same principle.

In a case of local trespass the power of the Court was denied. 27 H. 8. 2*. So where the Court *has not certain knowledge* of the cause by the record or other apparent matter, as in an action for *slander*, though the defendant justify, it was held that the Court could not increase damages. 1 Roll. 572, K. 2. D. 2. Ma. 105. 15. So in trespass for trees cut. Id. 572, K. 13; 3 H. 4. 4*; 1 Brownl. 204. So in replevin. 3 Leo. 213, *Ognell's case**, where the Court take the distinction, by declaring that for the avowant they might assess damages without a writ of inquiry, because it is for delay in nonpayment of rent: but for the plaintiff in replevin, they said they could not do so, since he is to recover for the taking of his cattle, of which the Judges could take no notice; for the damages might be greater or less, according to the value of the cattle, and the circumstances of the taking and delaying them.

In Bro. Abr. Dam. pl. 40; 3 H. 4. 4. it is suggested, that in trespass for cutting trees there is no direct power in the Court to increase or abridge damages, because the Court cannot come *at a certain knowledge* of the damages; and upon this principle the Court refused to increase the damages in trespass for cropping trees. So it is said that damages upon verdict cannot be increased or abridged by the Court, for that the remedy is by attain. Bro. Abr. Dam. pl. 7. In some cases, however, it appears that the Court did not adhere to the principle with perfect consistency, or being aware of a defect of authority, they resort to contrivance, and assert a power indirectly to compel the plaintiff to remit part of his damages, by refusing to give judgment but upon the terms of reduc-

* See these Cases inserted at the end of this Note, at large.

tion, if *in the opinion* of the Court the jury have given excessive damages. Bro. Abr. Judges, pl. 22. The right, however, to exercise such powers, as sometimes assumed by the Courts, has frequently been denied (obviously upon the ground of uncertainty) in actions upon the case for words, as well as other actions. Jenk. Cent. 68*, pl. 29; Dyer, 105, *Bonham v. Lord Stourton*; *Hawkins v. Sciety**, Palmer, 314; and in *Tong v. Formaby*, E. 43 Eliz. B. R. the Court refused to increase damages in an action for trover and conversion; Sayer, 77; but they said it would have been otherwise if it had been of money, the value of which is known to the Court.

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In modern cases the principle has been more distinctly avowed.

In *Robinson v. Bland*, after argument upon special verdict, interest was given by the Court up to the time of the judgment, the action being upon a contract for repayment of *a sum certain*. So upon judgment by default, in an action of covenant upon a deed of indemnity, the Court considering that it was not a *mere question of computation*, because the defendant might, before the sheriff and jury, show satisfaction or part satisfaction of the debt, from securities and effects of the principal, the reference to the Master was refused, and a writ of inquiry awarded. *Denison v. Mair*, 14 East, 622.

Among the ancient authorities, being so numerous and so little consistent †, if those last selected may be considered as furnishing the true principle of jurisdiction, the cases cited in the note to *Holdipp v. Otway* tend to establish a doctrine with too much latitude; for if the Courts have now power to assess damages in an action of trespass for a forcible entry into a house, and illegal outrage committed by officers of the revenue, according to the precedent cited in the notes to that case, there seems to be no reason why they should not assess damages in

* See these Cases inserted at the end of this Note, at large.

† See the Abridgments of Fitzherbert, Brooke and Rolle, tit. Damage, Judges, Inquest, &c.

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actions for assault, libel, slander, or criminal conversation, nor why the doctrine founded on the principles of pleading should not prevail, that when judgment passes after demurrer, confession, default, &c. the plaintiff is entitled to the full damages laid in his declaration. In such case he may choose to retain them without inquiry, (for it is only with his assent that the Court can interfere,) although it were in an action for words, and 10,000*l.* are claimed for damages by the count.

It seems, therefore, a point of some doubt whether the power can now with propriety be distinguished from the practice of the Courts, and whether, on the principles avowed in the best of the ancient authorities, the power ought not to be confounded or identified with that practice.

The decision in the case now reported, as no observation was made in giving judgment, might be supposed to proceed upon the authorities cited in the argument for the defendant in error, and to establish the unqualified proposition advanced or suggested in that argument, or to be inferred from the authorities on which it rested. But in *ex parte Greenway*, 1 Buck. 418, the Lord Chancellor, in the course of his observations, is reported to have said, "During the late sessions (1819) there was a very learned argument before the House of Lords, in which it was clearly made out, by the authority of cases of great antiquity, that a Judge, where it is *a matter of mere computation*, may give interest, but yet such interest is in the nature of damages." In this observation, the Lord Chancellor, with that circumspect discretion which is the consummation of his great legal erudition, seems to limit the generality of the proposition within the narrow compass of actual practice. But the authorities as they were cited, and the inevitable result of the argument for the defendant in error in the case reported, is to establish a much broader position.

The extent of jurisdiction which belongs to the several Courts is a subject of most important inquiry; and it is

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highly material to ascertain to what extent the doctrine in question is applicable or may be carried. Ancient authorities ought to be equally binding in all cases where they are not abrogated by contrary decisions. If the precedents cited in the argument of the case reported, and other similar precedents of equal authority, are to furnish the rule of law, and fix the boundaries of jurisdiction, the Courts of common law are now in possession of most extensive and alarming powers. But if we are not to be launched upon the wide ocean of obsolete precedents in search of the true principle and doctrine—and the jurisdiction is limited according to the restricted terms used in the observation of Lord Eldon, in *ex parte Greenway*: If the anonymous case, 1 Ventr. 330, and other precedents before noticed, are sufficient to prove that *the certainty of the demand* depending upon computation and not upon variable opinion, is the circumstance which creates the authority, or if practice, as the measure of power, is made the criterion and boundary of the jurisdiction to be exercised by the Courts, a more safe, convenient, and consistent principle of jurisdiction is established.

By the case of *Holdipp v. Otway*, and the authorities cited in the note of Serjeant Williams (if they are to be considered as existing law), the jurisdiction must, in theory at least, be carried far beyond the limit which modern Judges have prescribed to themselves in practice, but far short of the extent, to which, upon the authority of ancient precedents, as valid and efficient as that principal case, and those cited in the note, the Courts are entitled to exercise jurisdiction.

Such is supposed, *arguendo*, to be the theory of the law concerning the powers of the Courts, as distinguished from their practice; but the doctrine is founded upon inferences too partially drawn from unsifted authorities.

In modern practice, the exercise of the power has been confined to cases of ~~bank~~ upon bills of exchange or promissory notes, or in actions where the sum due appears

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with certainty upon the face of the contract, as stated on the record, or is mere matter of computation. This power, in the case of bills and notes, is equally exercised by the Court, whether interest is expressly reserved or not. The interest is given, indeed, in contemplation of law, as damages for detention of the debt; but this proceeds upon mere technical reasoning. The expression of the Chancellor in *ex parte Greenway* is, that it is *in the nature of damages*.

Interest upon a bill, when over due, by the custom of merchants, is due upon the contract by implication at least; and by the custom, interest upon a bill is as much a part of the contract, though not expressed, as the principal sum. The computation directed by the Court to be made by its officer in the cases of bills of exchange, in substance, undoubtedly proceeds upon this implied contract for interest at the legal or current rate; otherwise the damages, in such case, would vary according to circumstances, and the certainty which furnishes the ground of reference would not exist. Taking the contract, independently of the custom of merchants, to be for the payment of a sum certain at a given day, or upon demand, interest, according to the rule of law, is due from the day when the money is payable, or from the demand.

Upon this principle, in *Robinson v. Bland*, 2 Burr. 1085, where a bill of exchange was given for money lent, Lord Mansfield said, although it was void in law as a security, it showed the intention and agreement of the parties, that the money should carry interest if not repaid within the time expressed in the bill; and the Court, upon a special verdict, gave interest to the time of the judgment.

If these may be assumed as the true grounds on which the power of the Court to assess interest is exercised, an inquiry important in principle arises with respect to the practice in bankruptcy, not to permit proof of interest upon bills of exchange in which interest is not expressly reserved, and the late decisions resting upon that practice (in *Cameron v. Smith*,

2 B. & A. 305 ; and *ex parte Greenwhay*, 1 Buck. 418), in which it was held that interest, accrued upon a bill of exchange before the act of bankruptcy, cannot be added to the principal, so as to constitute a valid debt, for a petitioning creditor.

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If the two questions depend upon the same principle, and if they were untouched by decision, and unaffected by practice, it might appear surprising that such doctrines should ever have been established. The main objections to the admission of proof of interest, where it is not reserved by the contract, seem to be the following ; viz. that interest, being a compensation for the use of money, or detention of a demand, where it is not matter of express contract, is not a *debt*, but in the nature of *damages*, to be assessed by a jury, and that Commissioners of bankrupt have no power to assess damages.

As to the first branch of the objection, in the case of *Herries v. Jamieson*, Lord Kenyon appears almost in terms to lay down the general proposition, that an action of debt is maintainable for interest, notwithstanding the decision of Lord Hale in *Searman v. Dee*, 1 Vent. 198. " that no action of debt lies for interest of money, but it is to be recovered by *assumpsit* in damages ;" and supposing it to be recoverable by *assumpsit*, according to the admission of that case, it seems that the technical rigour of pleading has been relaxed since the days of Lord Hale ; and now it is held, that wherever *indebitatus assumpsit* is maintainable, debt is also maintainable. *Walker v. Witten*, Doug. 1. It might therefore, not without some show of authority, be said, that interest is, in contemplation of law, as much in the nature of debt as of damages ; and so in fact the matter seems to be treated by the Courts in the cases above cited, where judgment passes by default, &c. For if interest upon a bill of exchange were not regulated by the custom of merchants, and by that custom reduced to a matter of certain computation ; if it were truly and substantially, in such case, a question of damages as to depend on variable opinions, the Court in practice

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would decline the office of giving their opinion as to the damage; and, according to many cases, have no authority to do so.

Again, debt is said to lie upon every contract in deed or *in law*. Com. Dig. tit. Debt. A judgment, therefore, being by implication of law (not otherwise), a contract by the defendant to satisfy the plaintiff, according to the terms of the judgment, debt is the form of action in such case. So if the judgment be, in a Court of London, by special custom, debt lies in the superior Courts, although the original action could not have been brought there. 1 Roll. 600. l. 45. So debt is said to lie, although there be only an implied contract, as upon a balance found due to one of the accounting parties upon account taken. 1 Roll. 598; l. 47. So if a bailiff pays more than he has received, debt lies for the surplus. Id. ib. l. 50. So for money paid by A. to the use of B. (though without his command) 1 Roll. 597. l. 25. Yelv. 23. (*Sed vide semb. contra*, 1 Roll. 597. l. 25.) So debt lies upon various customs. See Com. Dig. Debt; A. 9. and Lord Hale said, (Hard. 486.) that debt lies for every duty created by the common law or by custom. Now interest, by the custom of merchants, and by the acknowledged rules of law and equity, is due upon bills of exchange from the time when they are made payable; such interest, therefore, is due by custom, and it is due by implied contract.

But suppose the technical difficulty to be valid in law, and insuperable, the next objection is, that Commissioners of bankrupt cannot assess damages. This is not strictly accurate; for to a certain extent they do assess damages; where interest is reserved upon a promissory note, and the rate of interest is not expressed, but left to the implication of law or custom, the Commissioners are driven to the exercise of their powers of computation. The parties, to a certain extent, have agreed as to what shall be the liquidated damage for the detention of the debt, that is to say, that interest shall be paid; but there is no express agreement as to the rate.

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In such case, the Commissioners supply that which the parties have in words omitted, viz. the rate of interest: they exercise a judgment, therefore, to imply the rate; and when they compute the sum due in respect of the rate and the time, (two points not expressed or settled on the face of the contract,) they so far assess damages, if mere calculation is rightly so called. The implication of a rate of interest, where no rate is expressed, is founded upon custom and statute, which constitute the law. The same custom and the same law give interest upon a bill from the day appointed for payment. If the cases are similar in principle and fact, the results should be similar; yet in one of the cases an implication is raised, and a power of computation is exercised, in the other it is refused. So although there be no contract, yet if the payment of interest in particular trades and transactions is customary, as upon a settlement and balance of account, and especially if on former settlements interest was paid, a contract is implied, and interest is calculated by the Commissioners from the time of the settlement, and at a rate assumed to be according to the contract of the parties. In such cases, interest upon interest has been allowed. *Ex parte Champion*, 3 Bro. C. C. 436. The Commissioners, therefore, do not seem altogether to want those powers of computation, which are exercised by the Courts, or their officers, in similar cases; but they refuse to put their powers in action, unless the creditor has stipulated for interest *nominatim*, or unless there be a custom or transaction, or custom *and* transaction, from which an agreement can be implied.

Suppose, that upon a balance of account bearing interest by custom or implication, the debtor gives to the creditor a bill of exchange in the common form; according to the present practice, no proof is allowed upon the bill which represents the balance; but if the bill is lost, destroyed, or cancelled, and there is no evidence of its existence, interest immediately becomes proveable. Surely this is a singular inconsistency.

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The creditor holding a bill which is over due has a right to interest by his implied agreement, founded on the custom of merchants and the principles of law. This right being, in case of bankruptcy, the amount of the dividend in respect of that interest, by means of the practice in question, is transferred from him to the whole body of creditors, who profit by his exclusion, and the bankrupt himself, if there is a surplus, pockets that amount of interest which, by implication and custom, he contracted to pay, and which, from him at least, is certainly due. Many cases might be put, as where a trader is largely indebted upon bills and notes actually due, in which he might be a gainer by bankruptcy to a very large amount, and at the expense of his creditors. This does not appear to be fair dealing with the bill-creditor, or equal justice as between him and his fellow creditors, or as between him and his bankrupt debtor.

The question, as unprejudiced by practice, whether the law is fairly exercised, as regards such bill-creditor individually, and without regard or relation to others, must be tried by a review and consideration of the statutes relating to this subject; by the operation of a commission of bankrupt; the mode in which it affects the right of creditors; and what benefits and privileges are conferred by these statutes upon the bankrupt and the creditors respectively.

The act 34 & 35 H. 8. c. 4, only barred the creditor of such portion of his debt as should be paid under the provisions and powers of that statute, and left him in possession of his remedies for the recovery of the residue. The same provision is made by the 13 Eliz. c. 7. s. 10; and the 1 Jac. 1. c. 15. s. 3, re-enacts the like orders, benefits and remedies as to the traders therein described, as were provided by the 13 Eliz. c. 7. s. 11. The 21 Jac. 1. c. 19, reciting that diverse defects were daily found in the former statutes, &c. in the power given to the Commissioners for distributing the bankrupt's estate, &c. to the undoing of many clothiers

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(by whom the subjects are set on work), &c. for remedy thereof, it is enacted that the former statutes, &c. shall be in all things largely and beneficially construed and expounded, for the aid, help and *relief of creditors*, &c. and by sect. 3 of this act, the same benefit and remedies are provided as by the former acts. By sect. 9, of the same act, for the better distribution of the bankrupt's property among his creditors, the Commissioners are empowered to examine them on oath as to the truth and certainty of *their debts*.

So that the *early* statutes relating to bankruptcy appear to have the interest of the creditors only in contemplation. They treat the bankrupt as a fraudulent debtor and criminal; and in the title, preamble, and body of these acts, the relief intended and proposed to be given is for the creditor only. Every doubt as to his rights is to be expounded in his favour, if possible; and after receiving a dividend upon his debt, he is left in possession of his legal remedies for what remains unpaid.

By the provisions of the two first statutes, which are re-enacted by the third, the effects of the bankrupt are to be sold, and ordered for the payment of the creditors according to the quantity of their *debts*. (34 & 35 H. 8. c. 4. s. 1. 13 Eliz. c. 7. s. 2.) Here it is to be remarked, that the provision is for payment of *debts*, and no other word being used in these acts, it is material to ascertain whether this was intended in a technical sense. That it could not be so intended, is almost conclusively proved by the reservation of the rights and remedies of creditors after payment of dividends, and until their whole demand is paid. If any part of the claim of a creditor, as interest upon a bill of exchange over due, or upon money lent, remained unpaid by distribution of the effects under the commission, or provisions and powers of these recited acts, the creditor might have brought his action for the amount. It would therefore, so far as the bankrupt was concerned, have been nugatory; whilst such right and remedy existed, to have made a

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distinction between principal and interest in assorting the dividend, as if the one were a debt contemplated by the statute, and the other only a demand or unliquidated claim, in respect of the detention of the debt, to be compensated in damages; and in truth, if nothing but debts, technically so called, were to be considered in distribution, a bill of exchange, and many other claims then and now undoubtedly proveable under a commission, were not debts in a technical sense, but choses in action, and according to this strict construction of the word, could not have been proved at all.

In this state the law of bankruptcy, as it regarded the rights and remedies of creditors, continued from the reign of Henry the 8th to that of Queen Anne.

The stat. 4 & 5 Anne, c. 17, reciting that bankruptcies happen not so often from losses or misfortune, as from the fraudulent design of evading the just "*debts and duties*" of creditors, after providing that bankrupts not surrendering and conforming, as required by the statute, shall suffer death as felons, enacts (s. 7.), that those who do surrender and conform shall have an allowance out of the effects, and be discharged from all *debts* due and owing at the time (of the bankruptcy); and in case such bankrupt shall be arrested, prosecuted, or impleaded for any *debt* due before (the bankruptcy), such bankrupt shall be discharged upon common bail, &c. This act has expired, but the clause is repeated verbatim in subsequent statutes also expired, and is re-enacted in the same words by the 5 Geo. 2. c. 30. s. 7.

Now in all acts made *in pari materia*, and particularly in all the clauses of one and the same act, the same word must have the same meaning. It would be a singular rule of construction to establish, that in one clause a word should have a given meaning, and in another clause of the same act, being used with the same unqualified context, might have a different meaning. In the preamble to the 4th and 5th Anne, c. 17, the *debts and duties* due and owing to creditors are mentioned as the

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subjects in contemplation, for the securing which, a remedy is to be provided by that act. But all the other statutes of bankrupt, in the clauses which relate to the investigation and proof of the claims of creditors, speak only of "debts." The 5 Geo. 2. c. 30, being in most respects a transcript and compilation of the former statutes, adopts the same enactments in the same words. In the preamble it speaks of bankrupts by extravagance, &c. having contracted great *debts*, and absconding with their effects in order to oblige their creditors to accept a composition for their *debts*, &c. By section 25 of the same act, creditors are allowed to prove their *debts* without contribution, &c.; and the bankrupt, by section 7, is discharged from all *debts*, &c. in the same terms as by the expired statute of the 4th and 5th Anne.

Here I presume it cannot be disputed, that the *debts* contemplated in the preamble of these acts, and the *debts* in the clauses relating to proof and discharge, are the same things in *genere et specie*. If *debts* are technical things in the preamble, they must be technical also throughout the act; and if interest due upon a bill of exchange, before and at the time of the bankruptcy, cannot be proved, because it is held not to be a debt technically, but to sound in damages; then as the bankrupt is discharged only from *debts* (technically also) due and owing at the date of the bankruptcy, a very serious question might have arisen, whether interest due upon a bill of exchange was a claim discharged by the certificate, and whether, if *debts* are not held in construction of the act to comprise such damages as are due for the detention of money, an action might not be brought for interest due upon a bill after the bankruptcy, and notwithstanding the certificate, especially as it has been pronounced by a Judge of considerable authority, that "debts provable under the commission, and debts discharged by the certificate, are convertible terms." See *Barnford v. Burrell*, 2 B. & P. Dict. of Buller, J.

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Considering this as a point of practice, all questions may now be precluded by decision; but, for the sake of consistency in construction, there was a time when it deserved better consideration in courts of justice; and it may even now be not undeserving of the attention of the legislature, upon a revision and consolidation of the bankrupt laws. That interest upon bills of exchange under the earliest of the statutes concerning bankruptcy, should not have been admitted to proof, may not be surprising, because the law-merchant, as it relates to bills of exchange, was, at that time, strange to our courts of justice, and not very clearly understood or recognized. In the days of Lutwyche it was held that none but actual merchants could draw a bill of exchange. 891. 1585. And at the time when Ventris and Salkeld reported, it seems to have been seriously debated, whether a person, not a merchant, making a bill of exchange, should be bound by it according to the usage of merchants. In the King's Bench the decision was in the negative; but upon argument in the Exchequer chamber, that judgment was reversed; and this judgment of reversal was reversed upon writ of error in Parliament. The decisions, therefore, in these early times, as to bills of exchange, and the interest due upon them, whether by Courts of justice or Commissioners of bankrupt, ought not to excite our surprise. But that no provision should have been made upon the subject in the comprehensive statute which was framed and passed in the commercial age of George the Second, is truly matter of astonishment.

If the claim of the creditor, in respect of interest, although recoverable only as *damages*, is discharged by the certificate under the term "*debt*," then it must be supposed, that the legislature, which took away the remedy of the creditor by action, intended to deal justly with him by substituting an equal or a better statutory remedy. It is in this sense, probably, that a commission

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of bankrupt has, by the highest authority, been frequently described as *inoflatu*, an action and an execution. If it were so intended for the benefit of creditors, as a more speedy and certain remedy against failing traders than the slow process of a suit at law, ought it not, in the construction of the statutes, to be intended with respect to all debts (or claims) discharged by the certificate, that the creditor is to have the same right of proof under the commission, as if he had commenced and prosecuted his action through all its stages, till he had obtained its fruit by execution executed. If the statute had not deprived the creditor of his legal remedy he would, in the course of process, have obtained the usual reference to the Master to compute interest, &c. upon his bill; or, according to the authorities cited in the case now reported, the Judges themselves might have assessed the damages without reference. If this be so, and the statute gives to the creditor, as it must be admitted, the substituted remedy of a commission, and empowers him to prove his debt, how could it be supposed that the debt contemplated was any other than that for which an action might have been brought, and for which, by virtue of the statute, the creditor has execution at once?

So the Commissioners having power to investigate and admit (if genuine) the debts of creditors, under a statute which transfers to them and their assignees all the effects of the bankrupt, to be distributed among the creditors rateably, as if they had brought their actions and obtained execution, ought it not to have been intended that they had the same power as Judges have in actions prosecuted by creditors? or that the statute, in giving the effect of execution, supplied by intendment of law all the intermediate necessary steps to make the claim of the creditor effectual.

There is another point of view in which this subject may be considered. Commissioners of bankrupt, as well as the Chancellor, are held to have an equitable

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as well as a legal jurisdiction, which they exercise in various cases; as where a verdict has been obtained at law for a pre-existing debt, if the Commissioners have reason to doubt the propriety of the verdict, or if there be equitable grounds sufficient to intercept the fruit of the verdict, though *per se* unimpeachable, they may reject the proof of the debt standing upon such verdicts. *Ex parte Butterfill*, 1 Rose, 172. So (probably) as to a judgment also, if equity would restrain execution against the bankrupt defendant. These are large powers which Commissioners of bankrupt habitually exercise—powers with which the computation of interest upon a bill of exchange is hardly to be put in competition; and it has been decided by a Judge of great eminence, that notes and bills of exchange payable on a certain day, or upon demand, not being paid on that day, or upon demand, shall carry interest in equity. *Per Grant, M. R. Lowndes v. Collins*, 17 Ves. 27. Here the objection will be renewed, that Commissioners, though they may exercise a judgment as to the validity of a debt, cannot assume a jurisdiction to assess damages. But in truth, it is, in the latter case, the mere exercise of the faculty of numeration, and this is the ground, and the only ground in practice, upon which the Judges assess damages (if it must be so termed), by reference to their officer in the case of judgment by default, &c. in a suit upon a bill of exchange. To assimilate the assessment of damages in such a case, with the assessment of damages in cases of assault, libel, slander, trespass, or any case of *tort*, may be sheltered under the technical definitions of law, but is an affront to common sense and to the established practice of the Courts.

It is, moreover, to be remarked, as applicable to the equitable jurisdiction of the Commissioners, that where there is any impediment to the remedy at law, equity removes it, or administers relief. Now if the claim of interest is barred by the certificate, and cannot *legally* be admitted

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to proof under the commission, because the Commissioners have no power to assess damages, might not a creditor, without incurring the charge of gross sophistry, contend that the statute and commission are impediments to his legal claim by action, and under the authority of *Lowndes v. Collins*, appeal to the equitable jurisdiction of the Commissioners, to admit his proof for interest?

Of the debts usually proved under a commission, some carry interest by contract: Upon some, interest is allowed by implication from former transactions, or from the custom of trade. In the case of other debts, as by bond, &c. interest (if not provided) is obtained under the shelter of penalties imposed by the instrument of contract; and in those which, perhaps, in all commissions are the most numerous class, *viz.* debts for goods sold and delivered, the tradesmen-creditors have taken care, in the price charged, to have ample remuneration for interest and profit, sometimes to the amount of cent per cent upon the prime cost—all these debts are admitted to proof without scruple. But if the words “with interest in case of nonpayment when due” (which are never inserted, because by the custom of merchants they are implied upon all bill transactions) are not to be found in a bill of exchange, the unfortunate holder, upon a technical fiction, which is evaded or surmounted by another technicality in the Courts of Justice, is excluded upon a commission of bankrupt, from his claim of interest for which, by the law-merchant, and the law of the land, an implied contract was made in the formation of the bill.

The injustice done to the holder of a bill, as between him and his fellow creditors, is obvious; but as between him and the bankrupt, in case of a surplus, it is flagrant injustice. Let it be supposed that a trader is indebted 200,000*l.* to creditors, upon bills of exchange in the ordinary form, which are ove due, and his only debts: let it be further supposed that he holds notes and other securities, bearing interest, to the amount of 200,000*l.* which are his only effects; upon all these

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securities interest is received for him by his assignees : then, after discharging the debts, and paying the expenses of the commission, the bankrupt pockets the surplus, composed of interest, which, if the commission has been long in operation, will be a considerable sum, and the bill-creditors are left, perhaps, to supply their necessities, occasioned by the bankruptcy, by borrowing money to the amount of their respective debts proved under the commission, and paying interest upon the loans from the time when their respective bills became due to the time when they receive their dividend. Can such a result have been intended by statutes made professedly for the benefit of creditors ?

Lord Hardwicke, according to the report in *Ex parte Bennet*, 2 Atk. 527, said, that “ the fund (in bankruptcy) “ was a dead fund ; and in such a shipwreck, if there “ is a salvage of part to each person, it is as much as “ can be expected.” But here is a case, occurring partially in many bankruptcies, where the fund, in respect of interest, is dead to the creditors, but living to the bankrupt ; where the creditors suffer shipwreck, and the bankrupt looks on with complacency from his retreat on the shore.

That the Commissioners of bankrupt should now, after inveterate practice, undertake to begin so important an alteration in the administration of the bankrupt law, is not to be expected or desired ; but when the statutes of bankruptcy are under revision, the subject may deserve consideration.

The following are some of the Cases cited in the foregoing Note.

The two first are close Translations from the Year Books.

Year Book, 3 H. 4. 4.

Trespass was brought against a man for trees cut, who pleaded that he was not guilty ; and he was found guilty to the damage of 40 s. and they taxed the costs of the writ at 5 s. Whereupon

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Culpepper, for the plaintiff, ~~pleaded~~ that the damages might be increased; and then Thirning said, that he had spoken of this matter to all his companions, and also to the Justices of the King's Bench, and it seemed to them that it lay within our cognizance and discretion as to the costs of the writ, and this we may well have full power to increase; but as to the damages for the trees cut, by no means; for that this lies not within our cognizance.

At the end of the case as it stands reported, the following observation and authorities appear: "Where the Judges increase and abridge damages, see M. 19 H. 6. 16; T. 32 H. 6. 1; M. 38 E. 3. 30; M. 39 E. 3. 26; M. 22 E. 3. 11. 30; 20 Lib. Ass. plac. 30; P. 8 H. 4. 23; 7 H. 4. 31."

Year Book, 27 H. 8. 2.

In trespass *quare clausum fregit*, the defendant pleaded in bar. Whereupon the plaintiff demurred, and it was adjudged no plea. Wherefore a writ issued to inquire of the damages, and damages were found to the value of five marks. Wilby prayed the Court that they would abridge the damages, for (as he alleged) the truth was, that the plaintiff was not damaged to the value of twelve pence, and this proceeding being only an inquest of office, he said the Court may increase or abridge the damages at their discretion. But Fitzherbert, Shelley and Englefield interposed, and said, "that cannot be done as to the damages; you have never seen this in your life: as to the costs, it lies in our discretion, but damages cannot be increased upon a local trespass." Wilby again suggested that the Court might have assessed the damages to the plaintiff without any writ of inquiry, and would have inferred the power from that circumstance. But Englefield interposed, and repeated, "this cannot be done upon a local trespass which is done in pais," and assigned as a reason that they could have no knowledge of it; and this doctrine Fitzherbert and Shelley did not deny.

Hawkins v. Sciet, Palmer, 314.

In an action upon the case for calling the plaintiff a bankrupt, upon the general issue it was found for the plaintiff, and 150*l.* damages given. And because of these great damages, the Court, from some circumstances, reduced them to 50*l.*; but afterwards, upon great advice, they revoked this, and were not willing to

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change the course of law, and resolved to leave such matters of fact to the finding of a jury, who better know the quality of persons and their condition, and the damage they may have sustained by such disgrace. But otherwise where the action is grounded upon a cause which may appear to the view of the Court, upon which they may judge, as in mayhem, &c. and *Dyer*, 105, acc. and so they gave judgment for 150 l. according to the verdict.

In *Jenkins*, Cent. 68. ca. 29. the law is thus laid down: In a writ of trespass *de clauso facto*, the jury found damages; the Judges can neither increase nor abridge them. So it is where there is a writ to inquire of damages in trespass; 27 H. 8. 2. So it is in an action on the case for slander, where the jury taxes damages. So in an assize. But it is otherwise upon a writ of inquiry of damages in debt, mayhem, detinue, covenant, battery, the Court may increase or diminish the damages assessed by the jury. 9 H. 6. 2; 19 H. 6. 18; 11 H. 4. 10. 61; *Dyer*, 105; 14 H. 4, recordare; 13 E. 3; *Fitz. Damage*, 28; 41 E. 3. 19.

In the margin is the following entry: 3 H. 4. 4; 22 E. 3. 1; 19 E. 3. 65; 8 H. 4. 17. by all the Judges of England.

Ognell's case, P. 30 Eliz. 3 Leon. 213.

In replevin, the plaintiff being nonsuited, the Court were of opinion, upon a question made, that they might assess damages for the defendant without a writ of inquiry, because they accrue to the avowant for the *delay in nonpayment of the rent*. But if *judgment had been given for the plaintiff*, the Court said they could not assess the damages, for he ought to recover for the taking of his cattle, of which the Judges could not take notice; for the damages might be greater or less, according to the value of the cattle, and the circumstances of the taking and delaying of them.

I N D E X.

N. B.—*The initials L. R. subjoined to an article, denote an opinion expressed by Lord Redesdale. In all other cases the opinions are those of the Lord Chancellor.*

ABANDONMENT. *Vide* INSURANCE.

ACQUIESCENCE. *Vide* ATTORNEY AND CLIENT.

ACCOUNT DELIVERED. *Vide* ATTORNEY AND CLIENT.

ADMINISTRATION. *Vide* CHARGE. ENTAIL. JURISDICTION. LEASE. POWER. PROHIBITION. TAILZIE.

Where there is no authority under a Scotch entail, the heir cannot lower the rents, except in case of necessity. *Semb.*

Whether implied prohibition, or want of power, this incapacity must be founded in some principle connected with the administration of the estate, if an heir of entail has not this power, except in cases where it is necessary.

If an heir of entail can show, that where he lowered the rent he did it of necessity, that would not be a case in which it would be said to be wrongly done; but supposing he cannot lower the rent in a case in which it is not necessary, it must result from this principle, that those who are to enjoy the estate which he is bound to take care of, shall not enjoy it in a state less beneficial than they would if the rent was not lowered; and that proves the principle, that the heir of entail is bound to pay some attention to what is called the *rational and due administration* of the estate. — *Queensberry Leases* - - - - - page 426

AGENT. *Vide* PRINCIPAL.

AGREEMENT. *Vide* CONTRACT.

Although an agreement is confined in its terms to the stipulation to set and let in tack the lands, and there is not in the agreement a word about privileges or appurtenances or others, the words which are usually engrossed in the formal conveyance; when the agreement is to be specifically performed, and a tack set

of those lands accordingly, the scroll of tacks, if regularly drawn out in implement of the articles, must convey with those lands for the term all the privileges, &c. which *belonged to the lands*.—*Paton v. Brebner* - p.71

In articles of agreement for a lease, by one of which it is agreed that the lands demised shall be paid for at a certain rate (3*l.* per acre); and in other separate articles, the proposed lessor agrees to grant to the proposed lessees the privilege of drawing water, for which no consideration is expressed to be payable; and between the same parties there is another contract for contiguous lands, in which contract a sum is expressly given for the liberty of taking the water; it cannot be supposed that because a certain sum per acre is to be given (according to the literal expression) for the land only, the parties did not mean that as a compensation for all that the one was to grant and the other to enjoy under the agreement and the lease which was to follow.—*Ibid.* - - 73

Although there is no separation between the different parts of this 3*l.* sterling for the land and the liberties to be granted, it would be extravagant to say that the lessee did not contemplate the advantage he was to receive from the whole he had stipulated to enjoy under that lease.—*Ibid.* - - - - - ib.

ALIENATION. *Vide* CROWN LANDS. ENTAIL. LEASE. PRACTICE. RENT.

The word "alienation," in all time, has prohibited a long lease in Scotland. There never was a period when it was not an alienation.—*Queensberry Leases* - - 400

Alienation, whether long or short, in essence, nature and quality, is exactly the same. A lease of nineteen years, and a lease of thirty-one years, do not differ as to their essential qualities and attributes; the one is no more an alienation, nor less, *primâ facie*, than the other; the one is no more and no less, *primâ facie*, an allocation.—*Ibid.* - - - - - 401

Upon the strict rules of the interpretation of tailzies, alienation means transference of property; and a lease is neither in the law of England, nor the law of Scotland, a transference of property.—*Ibid.* - - - 458

By the law of Scotland, until the statute of 1449, leasing, which in other words is called location, was a sort of right (and so in the law of England) which the tenant had to enjoy the premises demised or tacked, not by virtue of any transference of the property itself, but having a mere possessory right, or a mere personal right, under the contract. In the year 1449, in Scotland, an act made it a species of real right; but though a species of real right, it is not a species of real right deduced from alienation, in the technical and strict sense of the word; because alienation, in the technical and strict sense of the word, is transference of property — *Queensberry Leases*, p. 458

ANNAILZIE. *Vide* WORDS.

APPEAL. *Vide* PLEADING.

APPOINTMENT, ILLUSORY:

A person having a power of appointing a certain sum of money among his younger children, under a settlement, made an appointment to one of those children, who was at that time dying in a consumption. The object of this appointment was, that if the child died, the father should take out administration to that child, and claim the estate himself. That was according to the letter of the power; but the Court said, that should not be, because it was substantially an appointment to himself and not to the child. — *Queensberry Leases* - - - 348

APPROBATE AND REPROBATE. *Vide* ELECTION.

APPURTENANCES. *Vide* PRIVILEGES.

ASSETS. *Vide* ENTAIL.

ATTESTATION. *Vide* WILL.

ATTORNEY AND CLIENT:

In England it may be objectionable for an attorney to lend the money of his client upon a bond, but not in Scotland, where the loan is upon heritable land followed by infestment. — *Macdonald v. Lallie* - - - 334
The policy of the law requires that it should be held, that a law agent knows that intimation of an assignation to the debtor is necessary, and that the security is imperfect without it. — *Ibid.* - - - - - ib.
An account delivered by an attorney to a client, showing

a transaction of loan of the client's money, and the nature of the security taken, does not operate as notice to put the client upon inquiry as to the regularity of the transaction; because the attorney is bound to advise and act for the client.—*Macdonald v. Lillie* - p. 335
 If there be taciturnity, courts do not inquire.

Professional men ought to be held to accuracy, but not to account twenty-five years after a transaction, if the circumstances of the particular case make it unreasonable; but circumstances are to be considered. Whether the client knows the law, is doubtful; but the law agent must know it, and ought to act upon it. 'This is the taciturnity,' not of the client, but of the law agent. Such a case by its circumstances is taken out of the principles of presumption and prescription, which ought to protect professional men.—*Ibid.* - - - - - 336

Professional men must be strictly held to such accuracy as to give security to their employers. Lapse of time, under circumstances, may be an excuse, but the former principle preponderates.

The safety of clients ought not to be discussed at the expense of their representatives, they ought to have costs.—*Ibid.* - - - - - ib.

AUTHORITY. *Vide* INSURANCE. GRASSUM.

Decision in the Westshiells case disapproved.—*Queensberry Leases* - - - - - 467

In the Westshiells case if it was meant to be a fraud upon the entail by taking bonds and bills not *eo nomine* as rent, but really and truly as rent, the trustees using this device to prevent the heir of tailzie or Court of Session from saying what was the real transaction, the fraud might be overreached by the Court —*Ibid.* - - 468

If the heir of tailzie can take grassum from tenant *A. B.* and agrees with *C. D.* that grassum should be thereafter paid by certain instalments; if the parties make a lease, which (upon the hypothesis of what the law was at the time of the decision of the Westshiells case) was a good lease independently of that collateral transaction, by reserving rent without diminution of the rental, because they have thought proper to constitute the relation of

debtor and creditor, that therefore the fruits of that relation were to be considered as rent, and to be ascribed to the relation of landlord and tenant, is a consequence that does not follow.—*Queensberry Leases*. - p. 468

The Westshiells case goes no farther than this, that the judges of that day took it for granted, that grassum was allowable where there was no diminution of the rent of the day; a proposition admitted by the pursuer, and not contended against by the defender; and they decided, that what was secured by bonds and bills was rent, and was not grassum.—*Id.* - - - - ib.

* Decision in the Westshiells case disapproved of by Eldon, C. because no distinction can be made between a grassum paid directly, and a grassum secured by way of future payment; they are both of the same nature; and unless both could be objected to, he who admitted the right to take grassums upon that deed, ought, in that case, to have been held to have no right to call for the payment to him of the sums secured by the bonds and bills.—*Id.* - - - - - ib.

McGill's case not a grave authority, because it was not effectually contested between adverse parties.—*Ibid.* 471

In the case of Westshiells, where bonds and bills were taken, it not being thought necessary that the rent should be increased, these bonds and bills were held to be rent, because they were connected with the transaction.—*Ibid.* - - - - - 473

It must be held that grassum is anticipation of rent, consistently with the opinion given in the Westshiells case.—*Ibid.* - - - - - 474

There is not so much decision upon the question of grassum as precludes the examination of what is the principle upon which the Courts have acted in other cases, and particularly with respect to long leases.—*Ibid.* - - - - ib.

All law ought to stand upon principle; and unless decision has removed out of the way all argument and all principle, so as to make it impossible to apply them, courts of law must find out what is the principle upon which the case before them is to be decided.—*Ibid.* - - - - 486

BARON AND FEME. Vide RESULTING TRUST. DEED.

BILLS OF EXCHANGE. *Vide JURISDICTION.*

CARRIERS :

The 26th of Geo. 3, c. 86, relates only to ships and vessels usually occupied in sea voyages, and is not an act of parliament which gives protection in case of small craft, lighters, boats, and vessels concerned in inland navigation.

—*Hunter v. M'Gown* - - - - - p. 580

A gabbert or lighter is not to be considered a ship or vessel within the intent and meaning of that statute.—*Ibid.* 581

CHARGE. *Vide HUSBAND AND WIFE. GRASSUM.*

Where annuities and debts are charges upon a tailzied estate, there is an implied prohibition (duty) that the succeeding heir of tailzie is to keep down annuities out of the proceeds of the estate, and he is likewise to keep down the annual rents of the heritable debts of the tailzier, with which the estate is chargeable, although in the tailzie there was no clause which ordered him to do so ; and those duties of keeping down the annuity and the annual rents by the persons representing the estate, are duties founded in an obligation which has some relation to the interest of successors in the tailzie.—*Queensberry Leases* - 446

CHURCH LANDS. *Vide LEASE.*

CLERGY :

Upon a fair construction of the statute 1593 (Scots), the clergy are not exempt from public impositions. The recital of that statute states a grievance, by pensioners and tacksmen having, in tack, gift or pension, the stipends of the ministers. This cannot be intended of collectors of taxes. L. R.—*M'Leu v. Walker* - - - 566

The word "taxation," in the enacting clause, is peculiar.—*Ibid.* - - - - - 567

In the construction of all instruments, where general words are annexed to or follow particular words, they are taken to be of the same kind and meaning.—*Id.* - - - ib.

It is enacted that the clergy shall enjoy their stipends free from all tacks, &c. notwithstanding any gift or disposition made to the contrary. This cannot be construed to allude to any public charge.—*Id.* - - - - - ib.

The statute 1593, exempting stipends from taxation, does not relate to personal impositions on the clergy.—*Ibid*

The word taxation introduced in the midst of other words, cannot be extended in construction to all kinds of taxation.

M'Lea v. Walker - - - - - p. 569

According to the ordinary rules of construction, it must be understood in the same sense as the words with which it is coupled.—*Id.* - - - - - 570

Taxation in that clause must mean something of the same kind with those other things which are expressly and specifically prohibited.—*Id.* - - - - - ib.

The words of the act imposing the property tax are sufficient to extend to the stipends of the clergy. By that act, "teinds, stipends, annuities, and all profits whatsoever," are made chargeable.—*Id.* - - - - - ib.

The practice of not charging the stipendiary clergy of the church of Scotland does not raise a right to exemption from charge.—*Id.* - - - - - ib.

COMPENSATION. *Vide* DEBTOR AND CREDITOR. ELECTION.

CONDITION. *Vide* ELECTION.

CONSIDERATION. *Vide* AGREEMENT, NOMINAL AND FICTITIOUS. PARLIAMENT.

CONSTRUCTION. *Vide* AGREEMENT. CLERGY. CONTRACT.

CROWN LANDS. DEED. JURISDICTION. PERJURY.

POWER. TAILZIE. VENDOR AND VENDUE. WORDS.

Parties must abide by what they have expressed, although it be contrary to what they meant.—*Paton v. Brebner*, 79

The question respecting the interpretation of deeds of tailzie must be considered, having regard to the different expressions, and the import of the different expressions which are to be found in those deeds, and as far and no farther, than legal implications in construction will authorize a judge to attend to the several provisions, as manifesting the general meaning of the authors of those deeds.

—*Queensberry Leases* - - - - - 439

Where heirs of tailzie are prohibited "to sell, wadset, dispose, &c. lands, or any part of the same, or to grant infeftments of life-rent or annual-rent of the same, or to contract debts, or do any other fact or deed whereby the same or any part thereof may be adjudged, appraised or any ways evicted from them or any of them, except so far as they are empowered, in manner after

mentioned; or to violate or alter the order of succession foresaid any manner of way whatsoever:" these words, "any manner of way whatsoever," appear to have relation to every thing that is before prohibited; and when in an antecedent part of the entail, it is stated, that the author of the tailzie may *dispose* in "any manner of way whatsoever," and the others are prohibited to *dispose* in "any manner of way whatsoever," under such expression the word "dispose" cannot mean only to prevent what is technically called disposition. *Semble*.—

Queensberry Leases - - - - - p. 440

It cannot be affirmed that the tailzies established by the statute 1685, are odious. A court of justice ought not to add to that act of parliament or to take away from the fair effect of it.—*Ibid.* - - - - - 460

As to the effect of tailzies, a judge ought not to enter into the consideration of its placing the property extra commercium, if they happen to make an estate tail into what may be represented as a perpetuity.—*Ibid.* - ib.

It is incumbent upon the Court to say, that what is complained of as an act which amounts to a breach of (the prohibitions of) a tailzie, is a breach within that act of parliament which sanctions the tailzie; and if the question is, whether a long lease is or is not an alienation within the meaning of the author expressed in the deed, it must also be considered whether it is an alienation within the intent and meaning of the act of 1685.—

Ibid. - - - - - ib.

The permission to lease "without diminution of the rent, at the least at the just avail at the time," is a provision which is made in favour of the succeeding heirs of tailzie; the meaning of it is by way of direction to the heir in possession to get what rent he can, not to let it be diminished, unless it is necessary, but to take "the just avail at the time" in all cases, not in that case only when the just avail at the time is less than ~~was~~ the rent before actually paid.—*Ibid.* - - - - - 486

CONTRACT. *Vide* VENDOR AND VENDEE.

Where articles of agreement are made to demise lands, with liberty to take water from an adjoining river, and other

uses, and in some of the articles allusion is made to cruives for fishing, contiguous to the lands demised, and rights are reserved by the proposed lessor with a view to their maintenance; those articles, independent of the reservation, being so improvident as to entitle the lessees utterly to destroy the value of the cruives, a question would arise, whether the agreement, even according to the articles, must not be construed as giving so much of the water of the river as to leave the cruives for the fisheries uninjured.—*Paton v. Brebner* - p. 75

A vendor may make a covenant, that after vesting the inheritance in the vendee for ever. the vendor is for ever to continue liable for all the damages which may be incurred by the vendee in the exercise of certain privileges and liberties, but when the question is, whether he has made it, the terms of the contract should leave no room for doubt.—*Ibid.* - - - - - 76

A conveyance referring to letters of a preceding treaty, but not specifying what letters, is too uncertain to incorporate the letters, and make them part of the final contract. (L. R.)—*Hughes v. Gordon* - - - - - 287

Letters on a previous treaty cannot be used in evidence to explain a contract, by showing what was intended to be part of the sale and purchase, although not expressed in the conveyance. (L. R.)—*Ibid.* - - - - - ib.

It is highly dangerous to admit evidence of letters upon a previous treaty, to explain a deed, unless there is fraud or misrepresentation to afford a ground. (L. R.) -*Ibid.*

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CONVEYANCE. *Vide* AGREEMENT. PRACTICE.

COSTS. *Vide* ATTORNEY AND CLIENT.

COURTS. *Vide* JUDGES.

COVENANT. *Vide* CONTRACT. ENTAIL. VENDOR AND PURCHASER.

A tenant of tailzie in possession, who is prohibited, &c. may from time to time take a renunciation of a lease and grant a new one; the effect of which would be the same as a covenant to renew annually for a term of nineteen years.

The obligation to do so makes no difference in a question between him and the heir of tailzie. Whenever the tenant

happens to die, the possession of the lessee must be under the lease actually existing.

With respect to the covenant for another lease, it is a mere personal contract, upon which there could be no possession.

According to the manner in which tailzies are constructed, that is, not to be denominated a lease or a tack for the whole period.

Entering into an obligation which does not fix itself by way of lease on the heirs of tailzie, would not affect the legal or equitable right *ultra* that of the person who grants the lease, and his power to grant.—*Queensberry Leases*, p. 404

CROWN LANDS. *Vide* ENTAIL. LEASE.

In the act prohibiting the alienation of lands of the Crown, except under particular circumstances, and except by way of exchange, by which the last rental should not be diminished, the word "rental" must be so construed that the value of the land which the King should give in exchange should be no greater than the value of the land which he should receive in exchange.—*Queensberry Leases*. (L. R.) - - - - - 530

That act was intended as a restriction upon the power of the Crown to alien lands; and therefore if the King gave in exchange lands, &c. the act required that the lands which he should receive in exchange should be of equal value, that is, that the exchange should be without diminution of the rental of the Crown; the word "rental" there clearly meaning real annual value.

The words of the statute must mean the real value and not the rent actually reserved. (L. R.)—*Id.* - - - ib.

CUSTOM:

Where custom warrants a waygoing crop, unless the tenant has the waygoing crop, he has not in effect the land for the whole term. (L. R.)—*Hughes v. Gordon* - 313

DEATH-BED:

A deed made upon death-bed is not absolutely void by the law of Scotland. In many cases it will regulate the title, notwithstanding the objection which the heir may raise against it. Until reduced to a nullity, it is only

voidable, and may be used for the purpose of ascertaining the intention of the testator.—*Ker v. Wanchope* 25

DEBTOR AND CREDITOR. *Vide* ATTORNEY AND CLIENT.

If a debtor, by obligation, having a counter-claim of compensation (set-off) against his creditor, knows of a transaction of loan, in which his creditor assigns the obligation as a collateral security to the lender, and the debtor suppresses his knowledge, leaving the parties to complete the transaction of loan and security, he cannot afterwards claim compensation so as to defeat the collateral security.—*Macdonald v. Lillie* - - - p. 332

DECLARATION. *Vide* JURISDICTION.

DEED. *Vide* CONSTRUCTION. **DEATH-BED.**

A court must interpret a deed. No court has power to set aside a deed. The ownership, prior to the deed, and the purpose of the deed, must be considered in giving the interpretation. If a case of fraud or mistake can be made out, there must be evidence to support the allegation of fraud or mistake. In the case of a married woman, it must be shown that a clear and explicit declaration was contrary to her intention in consenting to the deed. (L. R.)—*Jackson v. Innes* - - - 130-131

When a transaction is concluded by solemn deed, that settles the right between the parties; and unless there be misrepresentation, knowingly made by one of the parties, the legal and technical import of the deed must prevail.

(L. R.)—*Hughes v. Gordon* - - - 313

A lease executed, must stand according to the terms expressed, unless reformed for fraud or misrepresentation.

(L. R.)—*Ibid.* - - - ib.

DESCENT. *Vide* REDEMPTION.

DICTA. *Vide* PRACTICE.

DIMINUTION. *Vide* RENTAL.

DISPONE. *Vide* CONSTRUCTION.

DOWER. *Vide* MORTGAGE.

DURATION. *Vide* LEASE.

ELECTION. *Vide* EVIDENCE.

It is equally settled in the law of Scotland as of England, that no person can accept and reject the same instrument.

If a testator gives his estate to *A.* and gives *A.*'s estate to

B. courts of equity hold it to be against conscience that *A.* should take the estate bequeathed to him, and at the same time refuse to effectuate the implied condition contained in the will of the testator. The Court will not permit him to take that which cannot be his, but by virtue of the disposition of the will, and at the same time to keep what, by the same will, is given or intended to be given to another person. It is contrary to the established principles of equity that he should enjoy the benefit while he rejects the condition of the gift.—*Ker v. Wunchope* - - - - - p. 21

Although a will, containing dispositions of land, be not duly executed according to the statute, yet, if in the same will, personalty is given, upon condition that the legatee convey the land, in such case, inasmuch as the disposition of the personalty cannot be read without reading at the same time the condition upon which it is given, the gift and the condition are inseparable, and the case of election is raised, because the testator in the disposition, not of land but of personalty, expresses and directs what is to be done.—*Ibid.* - - - - - 23

ENTAIL. *Vide* CONSTRUCTION. LEASE. TAILZIE. ADMINISTRATION. ALIENATION. PROHIBITION.

The difference between lessees claiming under a Scotch and under an English entail is, that leases of short duration, under a Scotch entail, have been sustained against prohibitions. This might arise from the circumstance that the person making such entail might be presumed not to mean to prevent ordinary leases being granted of the estate; although, if the term "alienation" applies to leases at all, it is difficult to say why it is not to apply to those of short as well as those of long duration. A lease of short duration was, by the Scotch judges, held good, whereas the English judges have held leases, made by a tenant in tail, as voidable, not as void.—*Queensberry Leases* - 399

If a tenant in tail, after the statute *de donis*, had made a lease for years and died, this lease was not absolutely determined by his death, but the issue in tail was at liberty either to affirm or avoid it, as he thought fit; and the reason why such leases for years were not holden to be

absolutely determined by the death of the tenant in tail who made them was, because they were drawn out of an estate of inheritance, which by possibility might continue for ever.

This was a reasonable liberty given to the issue in tail, because it might be supposed that his ancestor was not qualified to keep all his possessions in his own manurance and occupation, but must necessarily let them out to farmers, who, by their skill in the arts of husbandry, would be best able to improve the soil, and by yielding an annual rent to the lessor or tenant in tail himself, would enable him equally to provide for the necessities of himself and family.

The judges of England, who have not the power which belongs to the judges of the Court of Session, upon this principle of policy would not hold the leases absolutely void, but voidable: The estate-tail, being an inheritance which might endure for ever, was an estate out of which a nineteen years lease might be drawn. If the issue in tail, or those who take after them, chose to complain of the lease, the judges held it void; if they did not complain, upon that sort of policy which is, it seems, more open to the Court of Session to act upon than to English judges, they held them voidable. - *Queensberry Leases*

p. 420

In contemplation of the law of England as it now stands, a tenant in tail has a *quasi* perpetual inheritance; he has powers which certainly do not belong to a tenant of a tailzied estate in Scotland; that is, a tailzied estate protected with all the clauses necessary for that purpose. (L. R.)—*Ibid.* - - - - - 499

The tenant in tail in England, if adult, is capable of rendering himself complete master of the land, as tenant in fee-simple, unless it is an estate held under grants of the Crown of a particular description, where the reversion is in the Crown, and estates-tail, generally, where the reversion is in the Crown. (L. R.)—*Ibid.* - - - - - ib.

In the latter case, a tenant in tail may bar all but the Crown, though he cannot bar the right of the Crown. (L. R.)—*Ibid.* - - - - - ib.

A tenant in tail in England, who is an adult, being capable of barring the entail, is not bound to keep down the interest of a mortgage affecting the estate, out of the rents of the estate; but, with respect to an infant tenant in tail, the rule is otherwise, for an obvious reason, that in consequence of his infancy he is not capable of making an absolute disposition of the estate; and therefore it is considered, that those who receive the rents for him, are bound to keep down the interest during his infancy. (L. R.)—*Queensberry Beases* - - - p. 499

A tenant in tail in England grants a lease, and does not bar the entail; the lease is not void, but it is voidable: if he grants a lease with warranty, and there are assets descending to the heir of entail, the lease is good, because the warranty will bind the heir of entail, if there are assets to answer that warranty; if he grants a lease, with a covenant binding the heir of entail, and there are assets descending to the heir to answer that covenant, the heir of entail is so far bound as to be compellable to make recompence for the breach of covenant out of those assets. (L. R.)—*Id.* - - - - - ib.

Therefore, a lease by a tenant in tail in England is not absolutely void but voidable, at the election of the heir, and it will probably be avoided or not by the heir, according to circumstances. (L. R.)—*Id.* - - - - - 500

EQUITABLE SEISIN. *Vide* MORTGAGE.

EQUITY. *Vide* ELECTION. FORFEITURE. HUSBAND AND WIFE. LEASE. POWER. DEBTOR AND CREDITOR.

EQUITY OF REDEMPTION. *Vide* RESULTING TRUST.

EVIDENCE. *Vide* CONTRACT. DEATH-BED. PRACTICE.

A Scotch instrument, though not good to make an effectual title to Scotch land, may be read to raise a question of election.—*Ker v. Wanchope* - - - - - 24

Where parties execute two agreements, the one by express words, (referentially) granting lands with privileges specified, the other granting contiguous lands, with the privileges "thereto belonging;" the former cannot be admitted as evidence to show the intention of the parties as to the privileges intended to be granted, by the latter agreement. If such evidence could be admitted, the

judicial conclusion would be, that the privileges specified in the one agreement were not intended to be granted by the other in which the specification is omitted.—*Paton v Brebner* - - - - - p. 86

Although an illegal understanding may exist between the grantor of a superiority, and his agents, the proof of that fact, and the inferences to be drawn from their declarations, and their intercourse and correspondence with each other, or with any of the grantees, is not evidence to affect the rights of other parties, unless they had adopted the agents of grantor as their agents in the transaction, so as to be affected by their acts and declarations.—*Stewart v. Crawford* - - - - - 173. 204

Although a party has been examined on interrogatories, yet if the case requires it, the Court may disbelieve him, provided circumstances had raised such a presumption, that his answer to it could not get the better of that presumption and drive it out of the judicial mind of the court.—*Ibid.* - - - - - 197

The contemporaneous creation of votes, and the number of votes contemporaneously created, are circumstances of evidence to be attended to in deciding whether the estates and votes are nominal and fictitious. *Ibid.* 198

Allegations that consideration-money was colourably paid, and to be returned afterwards to the grantor of the estate, cannot be entertained without proof, nor can it be presumed, in the absence of proof, that the grantees are under the corrupt influence of the grantor to vote as he directs.—*Id.* - - - - - ib.

It is contrary to the settled rule of legal presumption, to hold, that because a conveyance is made for less than the full value of the estate, therefore it must be a case *ubi aliud agitur, aliud simulato concipitur*. Those who make the allegation, must prove it.—*Ibid.* - - - - - 199

An estate, which upon the title deeds is clear, and which the parties aver is sincere as well as clear, is not to be held nominal and fictitious, by inferences and implications from the acts of other persons.—*Ibid.* - - - - - 205

EXCESS. *Vide* POWER.

EXECUTION. *Vide* POWER. RENT.

EXTRA-JUDICIAL RESOLUTIONS. *Vide* PRACTICE.

FIAR. *Vide* POWER.

FINE. *Vide* GRASSUM.

FORFEITURE. *Vide* LEASE.

A lease for lives of lands in Ireland, renewable for ever, is not absolutely forfeited by extinction of all the lives, and neglect to pay the fines for renewal, even after notice from the lessor. Under circumstances, the right of renewal may still exist and be enforced.

In a case where *A.* the heir of the lessee, having such right, had entered into an agreement with *B.* respecting an independent lease of the lands, held under the renewable lease by the ancestor of *A.* which independent lease *B.* had obtained from the landlord, when in a state of intoxication and by circumvention; it was held, that the heir of *A.* and purchasers for valuable consideration, claiming under him, were entitled, in equity, to the benefit of the agreement between *B.* and *A.* and that the heir of the landlord (lessor) was entitled to the benefit of the same agreement, so far as *B.* took an interest.—*Butler v. Mulvihill* - - - - - p. 137

FRAUD. *Vide* AUTHORITY. DEBTOR AND CREDITOR. DEED. EVIDENCE GRASSUM. LEASE. NOMINAL AND FICTITIOUS. PARLIAMENT. REDEMPTION. RENT.

It must be upon the general state of the transaction that the court may collect that an estate, instead of being intended to be used or disposed of by the grantee, was intended between them to be at the use and disposition of the grantor; and whenever a case affords circumstances sufficient to raise that presumption in an unanswerable degree, or to raise it in a degree which the party himself cannot answer by his oath, the vote must be held to be void.—*Stewart v. Crawford* - - - - - 196

Under an entail, prohibiting, &c. a lease for nineteen years, reserving a large rent for the first part of the term, and a smaller rent for the remainder, is a contrivance to take grassum, which would not be endured by the law of Scotland. There is no instance of such a lease, and it

might be set aside by the succeeding heir of entail.

Semb.—Queensberry Leases - - - p. 483

There is no doubt that there may be fraud upon an entail,

—*Ibid.* - - - - - 467

GRASSUM. *Vide* FRAUD. LEASE. TAILZIE. AUTHORITY.

Letting leases for grassums, and taking bonds or bills from the tenants for part of their rents, payable by partial payments annually, for the same endurance with the tacks, is an unwarrantable devise by the heir in possession, to disappoint the succeeding heir of entail of a considerable part of the proceeds of the estate for many years after his decease — *Queensberry Leases* - - - - - 447

The decision in the case of *Denham v. Wilson*, that the heir of tailzie may contract for and take grassum at the commencement of a lease, and that the lease is valid, provided it be without a diminution of the rental, but if he deals with a tenant, who cannot immediately pay a grassum, and agrees with that tenant to take annually from him sums, which are in discharge of the grassum; that those annual sums are not to be considered as grassums, but rent, in other words, that the grassum must be presently paid, and that the lessor cannot give time to pay the grassum *de anno in annum*—(a decision which did not come before the House of Lords)—is a case which deserves a great deal of consideration.

It seems to decide, that if a sum of money, before or at the time of granting the lease, is taken as grassum, the succeeding heir has no right to complain, but if the Court can see from the whole transaction, that the sum taken was reserved as rent, although expressly in discharge or satisfaction of grassum, then it must be taken as rent, but why, because to be paid in future, it was to be taken as rent, appears a proposition extremely difficult to be deduced from the principles which must be supposed to have governed the case.—*Ibid.* - - - 452

By the law of Scotland the heir of tailzie cannot make a lease, which is to reserve to himself, during the first five years of lease, 800 *l.* a year, and then to reserve during the remainder of the lease 500 *l.* a year; the lease must not be more beneficial to the person holding at the com-

mencement of the lease, than to those who are to take after him.

If a man cannot, for the first five years of a nineteen years lease, take 1,000 *l.* or 1,500 *l.* a year for himself, reserving to himself, and those who come after him, 250 *l.* a year, for the remaining fourteen years of the lease, he cannot do that *per indirectum*, which he cannot do *per directum*; that is to say, instead of reserving the 1,000 *l.* or 1,500 *l.* a year, for the first five years, he cannot reserve throughout the whole of the lease only 500 *l.* or 250 *l.* a year, and take *in presenti* from his lessee, as much as the additional rent for the first five years would amount to.—*Queensberry Leases* - - - p. 453

A sum may be too large to be a grassum, so that the term grassum cannot be applied; as, where the heir of entail on an old rent of 3 *s.* a year takes 300 *l.* by way of grassum, it is not *bonâ fide* a grassum.—*Ibid.* - - - 461

Denham v. Wilson, is, in principle, an authority against grassum.—*Ibid.* - - - - - 463

There is no sound distinction between grassum that is paid and a grassum that is agreed to be paid and secured.—*Ibid.* - - - - - 467

Where the heir of tailzie in possession, in concert with a trustee for him or his wife and children, has agreed for a lease upon the full value of the land, and another lease is made to the trustee at the old rent with a grassum, and the heir of entail in possession is to have the disposal of this grassum; or if he does not take the grassum, the trustee is to hold it, and for trust purposes to have the benefit of the principal lease; that is anticipation of rent, and prohibited.—*Ibid.* - - - - - 473

The heir of tailzie in possession cannot take a grassum by dividing it into payments of rent for the first five years, and at the expiration of the first five years, leave those who come after him to take a diminished rent; and if he cannot take it by instalments of rent, he cannot take it in one payment at the beginning of the lease. The contrary doctrine is inconsistent with principle, and cannot stand.—*Ibid.* - - - - - 484

The Courts in Scotland have determined that grassum is

- rent; with respect to teinds, and superiors, and in all cases, except in the case of tailzied estates, grassum is admitted to be rent. (L. R.)—*Queensberry Leases* - p. 507
- There can be no distinction between the same thing with respect to an heir of tailzie, and with respect to other persons. (L. R.)—*Id.* - - - - - ib.
- Where an heir of tailzie in possession receives a sum of money on granting a lease, he receives it because the rent reserved upon the lease which he grants is so much less than the value of the land. Grassum would not be given to him, unless the land was let by the lease at an under rate. It is therefore rent received by anticipation, and received by one heir, instead of being received by a succession of heirs. (L. R.)—*Ibid.* - - - - - ib.
- The disposition which is contained in a lease made where grassum is received by a tenant of tailzie, restrained only by words prohibiting alienation, is a disposition of property during the period for which that lease is granted, in which there is a reservation of annual rent for the benefit of the person who succeeds him; but that reservation does not convey the same benefit as that which the tenant of tailzie granting the lease upon grassum, stipulated for himself. (L. R.)—*Ibid.* - - - - - 524
- Taking grassum is in effect a diminution of the rental, or former rent, by the effect of outgoings calculated upon grassum as rent, and operating to reduce the nominal rent. (L. R.)—*Ibid.* - - - - - 528
- As to all the world, except the heir of entail, the grassum has always been considered as part of the rent, and all the charges upon the estate are assessed accordingly. (L. R.)—*Ibid.* - - - - - 529
- There is nothing in the law of entails that makes the condition of the heir of entail different from that of other persons with respect to the meaning of the word rental. If grassums previously received are to be considered as part of the rent, when the land is let again (whether with another grassum or without a grassum) at the same nominal rent, the land is let at less than the rent that was before actually received, though the same rent is nominally reserved. (L. R.)—*Id.* - - - - - ib.

The rent before taken by the grantor of the lease was compounded of the grassum and the reserved rent. When the lease which was so granted was either surrendered or expired, if the grassum was not taken into consideration, in fixing the reserved rent on a second lease, then the land is set with diminution of rent, in the strictest sense of the words, independent of the additional charge brought upon the actually reserved rent by means of the grassum. (L. R.)—*Ibid.* - - - - - p. 529

The effect of taking grassums, is to make all leases which have been granted at the old rent upon grassums, or upon the surrenders of leases granted upon grassums, not within the power of leasing given by the deed of entail; and the lands comprised in such leases have been set with diminution of the rental, even if the word "rental," in the deed of entail, is not to be construed as meaning the rent which might be obtained for the estate at the time. There are no words in the deed of entail expressing that the word "rental" meant the rent reserved. (L. R.)—*Ibid.* - - - - - 530

HEIR. *Vide* DEATH-BED.

HEIR OF TAILZIE. *Vide* ADMINISTRATION. GRASSUM.
PROHIBITION. CHARGE.

HUSBAND AND WIFE. *Vide* DEED. MORTGAGE.
RESULTING TRUST.

If there be a distinct declaration, in no manner depending upon the proviso for redemption, but defining the course in which the property is to be carried after the satisfaction of the mortgage; as where the wife joins with her husband in a mortgage of her lands, by a deed containing a proviso and declaration, that if the husband and wife, or either of them, or their heirs, executors, &c. pay to the mortgagee, his executors, &c. the sum borrowed, that the fine to be levied, according to a covenant contained in the deed, should enure to the husband and wife, and the longest liver of them, with remainder to the right heirs of the husband for ever; and a fine is afterwards levied, according to the agreement among the parties, the subsequent declaration and limitation having no connexion with the proviso for redemption, but declaring what

should become of the property after the mortgage is satisfied, operates against the construction of a resulting trust for the benefit of the wife.

It is in such case a distinct settlement, and she has parted with her estate; the distinction is stronger where it is a mortgage term which is made redeemable by the husband and wife, and the fee is the subject of settlement.

(L. R.)—*Jackson v. Innes* - - - - - p. 119

Where property, which belonged to the wife, was mortgaged, and settled upon the husband and wife, with remainder, not to the wife herself, but to the wife's sister; and it appeared that the money raised upon the mortgage being 1,100 *l.* was in part borrowed for the use of the husband, and part of it for the purpose of paying a debt incurred by the wife previous to the marriage; upon a bill filed by the sister, it was held, that there being a settlement of the estate, the husband was not liable for the money borrowed.

The general rule is, that where the husband borrows a sum of money for his own use, and the wife joins in a mortgage of her jointure for repayment of it, that her estate shall be a creditor upon the husband for that sum.

So, where there is no settlement, and the wife mortgages her estate of inheritance to raise money for the husband.

But where, at the time of executing such mortgage or security, a settlement is made, either before or after marriage, the husband has never been considered answerable to the wife's estate for the money borrowed. (L. R.)—

Ibid. - - - - - 122

It is an established principle, to be applied in deciding upon the effect of mortgages, that, whether it be the estate of the wife or the estate of the husband, if the wife joins in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure or dower out of the estate, and there is a mere reservation in the proviso for redemption of the mortgage, which would carry the estate from the person who was owner at the time of executing the mortgage, or where the words admit of any ambiguity, that there is a resulting trust for the benefit of the wife, or for the benefit of the

husband, according to the circumstances of the case.

(L. R.)—*Jackson v. Innes* - - - - - p. 127

The opinion of Lord Thurlow, that, in order to dispose of the equity of redemption of the wife in an estate, it was absolutely necessary there should be in the recitals of the instrument some expression that the parties meant it so; that it was not enough to collect the intention from the limitations; but that there must be something more upon the face of the deed to lead the wife to understand what those limitations were, cannot be supported. *Ibid.* 105

IMPLEMENT. *Vide* AGREEMENT. SPECIFIC PERFORMANCE.

IMPLICATION. *Vide* ADMINISTRATION. AGREEMENT.

HUSBAND AND WIFE. PROHIBITION. TAILZIE.

VENDOR AND VENDEE.

INDEMNITY. *Vide* SPECIFIC PERFORMANCE.

INFANT. *Vide* ENTAIL.

INSURANCE:

Though a ship is insured *at and from* a certain port, it is insured with a view to the probable continuance of the vessel at that port, and the voyage on which it is to be employed; for, according to the voyage, the continuance and delay in the port may differ.—*Tasker v. Cunningham*,

101

Where the agents and the captain of a ship had, on a former occasion, made alterations respecting the voyage, and the owners acquiesced in and acted upon their advice and determination, the owners constitute them agents, with authority to alter the destination of the ship.

—*Ibid.* - - - - - 102

Where a ship is insured *at and from A. to B.* and afterwards the agents of the owners, duly constituted, determine to alter the voyage to *C.* which they communicate by letters to the owners, although the ship remained in port, and a small part only of the cargo brought into port from a preceding voyage was delivered, and there was nothing to alter the voyage but intention, which might have been again varied, and there was no progress made in unloading the cargo, nor any other act done towards a change of voyage, this is not to be considered as resting in mere intention; and if a loss happen in the port of *A.* it is not

to be considered as a loss under the policy.—*Tasker v. Cunningham* - - - - - p. 102

INTENTION. *Vide* HUSBAND AND WIFE. INSURANCE.

PROHIBITION.

INTEREST. *Vide* ENTAIL. CHARGE.

INTERPRETATION. *Vide* CONSTRUCTION. PROHIBITION.

TEINDS.

INTERROGATORIES. *Vide* PRACTICE.

INTIMATION. *Vide* ATTORNEY AND CLIENT.

INTOXICATION. *Vide* LEASE.

ISSUE IN TAIL. *Vide* ENTAIL.

JUDGES. *Vide* CONSTRUCTION. ENTAIL. JURISDICTION.

TEINDS.

A court of justice has no right to entertain an opinion of a positive law upon any ground of political expediency.

(L. R.)—*Queensberry Leases* - - - - - 497

The legislature is to decide upon political expediency; and if it has made a law which is not politically expedient, the proper way of disposing of that law is by an act of legislature, and not by the decision of a court of justice.

(L. R.)—*Id.* - - - - - ib.

The effect of the statute *de donis* was counteracted gradually, by various contrivances, and with some assistance from the legislature. That statute has been, in effect, partially repealed by such contrivances. The effect of these contrivances has been so long considered as established law, that it cannot now be questioned. (L. R.)—*Ibid.* 498

In judging of any question of law, it is highly important to discover, in the first place, what are the principles upon which persons, who have had to decide upon the same question of law, have proceeded; because a court of judicature is not to decide capriciously or arbitrarily.

(L. R.)—*Ibid.* - - - - - 501

The object of every person in a judicial situation, and particularly of a person in the office of chancellor, should be, and always has been, to establish certain principles, by which not only he shall guide his own decisions, but by which others may decide similar cases, and by which those who have to give advice on similar cases may be able to give proper advice. (L. R.)—*Ibid.* - - - 501

If principles of decision are not established, it is impossible to say what will be the decision upon any case, or what advice ought to be given by those who are consulted on the subject. (L. R.)—*Queensberry Leases* - p. 502

JURISDICTION. Vide JUDGES.

The Court of Session cannot, by an act of sederunt, make an act criminal which is not so by the common law of Scotland. (L. R.)—*Macintosh v. Mackenzie* - - 284

The difficulty of construing powers of leasing, with reference to what is a necessary and fit and proper administration, must be encountered: the law has distinctly pointed out a variety of cases in which a judge cannot escape from that principle of construction.

Wherever a question arises, whether the lease is too long, or in other respects such as to fall within the reach of that principle which would aim at its destruction, it must necessarily become matter of judicial investigation whether it is a lease of that description or not.—*Queensberry Leases* - - - - - 416

The action of declarator is a useful proceeding in courts of Scotland: it enables a person to have it declared, whether there is or is not such a right, as he contends there is, and as other persons contend there is not.

The difficulty and uncertainty of a proposed rule of law in its application, such as the rule in the English courts of equity, as to what is an illusory share of a sum of money which a man has a right to appoint, is an objection to be surmounted by a court of justice.—*Ibid.* - - 479

In actions upon bills of exchange, containing counts in contract upon the bills, and a separate count for interest, not expressed to be by contract, but apparently sounding in damages, if the plaintiff obtain interlocutory judgment upon demurrer to the replication, it is not necessary that the damages should be assessed by a jury; the Court, on motion of counsel, may refer it to the Master, to compute the damages in respect of interest; and the plaintiff may enter up judgment upon the respective counts in contract and for interest, without remittitur as to the excess of the aggregate sums laid in those counts beyond the sum of principal and interest computed, and for

which he enters up judgment.—*Eyre v. Bank of England* - - - - - p. 581

LACHES. *Vide* FORFEITURE.

LAPSE OF TIME. *Vide* ATTORNEY AND CLIENT.

LEASE. *Vide* ALIENATION. COVENANT. ENTAIL. FRAUD. FORFEITURE. GRASSUM. JURISDICTION. POWER. PRACTICE. PROHIBITION. STATUTES. TAILZIE.

A lease obtained by fraud and circumvention from a person in a state of intoxication is void in equity.—*Butler v. Mulvihill* - - - - - 137

A reversionary lease, where there could be no possession during the life of the lessor, (heir of tailzie,) is bad.—*Queensberry Leases* - - - - - 404

According to the law of Scotland, except so far as the effect of the stat. of 1449 is to be considered, although a lease is different from an infeftment, a disposition, and other conveyances, and quite different from an alienation, understood in the special sense of alienation, that is, a transfer of property, and although it is in truth nothing more, either in the law of England or of Scotland, than a personal contract for the possession of land not transferred to another, and converted only into a real right, so far as the stat. of 1449 converts it into a real right, on doctrine as it is to be found in the Scotch books, in their statutes and instruments, a long lease is an alienation.

So with respect to forfeiture, a long lease is held to be an alienation; with respect to forfeiture, if there is a grassum, it is held to be an alienation. So with respect to deathbed; so with respect to Crown lands and church lands, it is laid down in the language of the Scotch law, that a long lease is an alienation. The reason given in the case of forfeiture, is because such a lease is not of ordinary endurance, and because it is not a necessary and proper administration of the estate.—*Ibid.* - - - - - 415

In every text writer, and in all the decisions in which it is stated that a long lease is an alienation, it is put on the ground that it is a dealing with the estate which is not for the proper and necessary management of the estate; when long leases are held invalid, as not being necessary for the proper management of the estate, and that

doctrine is applied in the case of estates-tail, as well as other estates, that reason given for the destruction of long leases, is not held applicable to short leases, which are to be sustained, because that reason which destroys *long* leases does not apply to *short* leases. That is the only rule to be found ; and the English books treat this matter, about the leases of tenants in tail, upon the same principle.—*Queensberry Leases* - - - p. 419

A lease must not exceed ordinary duration; to be protected against singular successors, by the act 1449 : but what is *ordinary* duration, *quære*.—*Ibid.* - - - 423

In the stat. 10 Geo. 3. c. the legislature seems to consider a lease for fourteen years and the life of one person, or a lease not for any certain number of years, but for the lives of two persons, or a lease not for any life or lives, but for thirty-one years, as being in some respects equivalent to each other, in the ordinary and proper management of a Scotch estate.—*Ibid.* - - - 430

A lease for thirty-one years ; if that will not do, for twenty-nine years ; if that will not do, for twenty-seven years ; if that will not do, for twenty-five years ; if that will not do, for twenty-three years ; if that will not do, for twenty-one years ; and if that will not do, for nineteen-years ; with an agreement that if the House of Lords shall decide in any case that a ninety-seven years lease is good, the lessee shall not have a lease for nineteen or thirty-one years, or any other fixed period of duration, but for ninety-seven or fifty seven, or the longest which the Court of Session or the House of Lords may approve, is not valid.—*Ibid.*

436

According to English law, there may be a good lease for ten years, if *A. B.* shall not come from Rome in ten years, or for twenty years ; there is a certain ish or determination in these cases.—*Ibid.* - - - 437

The question as to the endurance of leases under a tailzie, is connected with the question of grassum, and depends upon the same principle on which long leasing is held to be alienation, and short leasing not so.—*Ibid.* - - - 457

Semb. that a lease of nineteen years is neither too long nor too short.—*Ibid.* - - - 459

A lease of ninety years is too long; it is an alienation; not because it is a transfer of property, but because it operates as mischievously as a transfer of property.—*Queensberry Leases* - - - - - p. 459

The Scots act of 1685 speaks of such provisos and conditions as an author might think proper to insert in tailzies; but it has not one word about leases; and when it has been decided that a long lease is an alienation, it follows that a short lease is an alienation.—*Ibid.* 460

Every lease must be an alienation; but it is long settled, as necessary for the purposes of production and enjoyment, that short leases should be endured.—*Ibid.* - 461

A lease of ninety-seven years is a species of alienation not permitted to a person who holds an estate under strict (Scotch) entail; and a prohibition of alienation prohibits such leases. (L. R.)—*Ibid.* - - - - - 502

The prohibition to alienate extends generally to any lease, the lease being in itself an alienation *pro tanto*, during the continuance of that lease, except so far as a rent is reserved upon that lease, payable during its continuance. (L. R.)—*Ibid.* - - - - - ib.

A lease of a proper duration, and under certain circumstances, is to be considered as a fair administration of the estate, which it is necessary to allow to a person holding a tailzied estate, for the purpose of giving to him the benefit of the estate during his right to the enjoyment of it. If he were incapable of letting any lease, the consequence would be, that he must either hold the property, however large, in his own possession, or he must dispose of the possession of it to persons whose interest would terminate with his life. That inconvenience seems to have been considered as a sufficient ground for allowing some, but it may be difficult to say what, power of disposition by leasing to a tenant of a tailzied estate in Scotland. (L. R.)—*Ibid.* - - - - - 503

The language of all the persons who have spoken and written upon the subject, has been, that they considered the granting of leases by a person under the restriction of a tailzie, as a due administration of the estate, and a species

- of administration which was necessary for the enjoyment of the estate. (L. R.)—*Queensberry Leases* - p. 503
- As to what is to be the limitation of a lease under such circumstances, there is a great difficulty in drawing any line precisely; but if there is to be no limitation, the property may be in effect alienated; and when it has been decided that a long lease may be an alienation, as in the Wakefield case, upon every lease the question is, whether that which has been done is alienation or administration, according to circumstances. (L. R.)—*Ibid.* - - 504
- A lease of fifty-seven years, made by the heir of tailzie in possession, prohibited from alienation, and not having power of leasing, is void on the ground of duration. (L. R.)—*Ibid.* - - - - 505
- If the words prohibiting alienation affect any lease granted by the person in possession of the tailzied estate, they must affect a lease which does not reserve to the person who may succeed, the same benefit which the person who granted the lease derived from it, according to the term of his enjoyment of the estate; because whatever benefit was so derived from the lease by the person granting it, would be exactly the same thing as the benefit derived from reserving a large rent for the life of the grantor, and reducing it at the period of his death for the remainder of the term. (L. R.)—*Ibid.* - - - 524

LEASE FOR LIVES. *Vide* FORFEITURE.

LENGTH OF TIME. *Vide* ATTORNEY AND CLIENT.

LESSOR AND LESSEE. *Vide* CONTRACT. VENDOR AND PURCHASER.

LIGHTERS. *Vide* CARRIERS.

LIMITATION. *Vide* HUSBAND AND WIFE.

MANSION. *Vide* PROHIBITION.

MERGER. *Vide* VENDOR AND PURCHASER.

MISREPRESENTATION. *Vide* DEED.

MISTAKE. *Vide* DEED. REDEMPTION.

MORTGAGE. *Vide* ENTAIL. HUSBAND AND WIFE. REDEMPTION. RESULTING TRUST.

Where a husband, being tenant in tail, borrows money, and in order to make a security by mortgage of his

estate, the wife joins in a fine to bar dower, and the equity of redemption is reserved to the husband and wife and their heirs; but the deed contains a declaration that, after redemption, the fine shall enure to the husband and his heirs, it is not a legal but an equitable estate; and as an estate to be governed by the rules of equity, it is the seisin of the husband and not of the wife.

Upon a contest for redemption, the Court would regard the ownership of the estate previous to the mortgage, and in that view the husband would be considered as the person entitled to redeem, the wife being entitled to redeem only in respect of her interest, which would have been only a right to dower, if she had survived her husband.

In such case she would have been entitled to have had the estate redeemed for the purpose of letting in her dower, but there her right ends; and therefore the husband must be taken to be in equity sole seised of the estate, as if the mortgage had not been made.

The Court will put a true construction on the deed, by taking into consideration the ownership of the estate, and the purpose for which the deed was made; that the husband was the owner of the estate, and the intention of the deed was merely to make a mortgage, and the wife was made a party and joined in the fine, for the sake of the mortgage. (L. R.)—*Jackson v. Innes* - p. 123

Where the operation of a deed as to the mortgage term, and its operation as to the limitation of the fee, are wholly distinct, and do not in any way depend on each other, the question does not arise upon the interpretation of the proviso for redemption, but it arises upon a distinct and subsequent clause of the deed. The term and the fee are kept distinct in the deed. The term is a security for the repayment of the money lent; and when the mortgage is discharged, the intention of the maker of the deed, that the term should be at an end is effected, by declaring that upon payment of the money due the term should cease.

If the money is paid at the day, the term ceasing, there remains nothing of the mortgage operating upon the pro-

perty; but there would then remain the declaration in the deed, directing what should be done with the estate subject to the term. The term being at an end, the operation of the deed, so far as it declares the limitation of the estate, subject to the term, remains distinct, and has no connection whatsoever with the existence of a term which then has ceased to exist.

A court of equity will so deal with a declaration, that upon payment of a sum of money on a given day the term shall cease, that although the term becomes absolute by non-payment of the money at the day, it is still subject to redemption. By whom it may be redeemed, must be discovered from the title, which by the deed itself is declared to be in the husband and wife for their respective lives, then to the heirs of their bodies, and then to the survivor in fee. Upon the declarations therefore, and the provisions of that deed, the redemption would arise by implication, in case the money was not paid at the day. The implication must be drawn from the deed itself, declaring who were the persons entitled to the estate. (L. R.)—*Jackson v. Innes* - - - - - p. 128

NOMINAL AND FICTITIOUS. *Vide EVIDENCE.* PARLIAMENT. QUALIFICATION.

If a doubt fairly arises, whether a vote is nominal and fictitious or not, the want of consideration and other circumstances creating suspicion, would, on sound principles, mature a suspicion into judgment, that the estate was nominal and fictitious.—*Stewart v. Crawford* - 196

Although an estate is given and acquired for the purpose of enabling the grantee to vote for a member of parliament, yet if it is a real estate the decision of the House of Lords (in *Forbes v. M'Pherson*) would not interfere with it solely on that ground. But the law of Scotland, as declared by the authority of that House, is, that the conveyances are to be not only clear but sincere.—*Ibid.* - - - - - 202

If the freeholder refuses to answer, upon oath, the interrogatories which the Court has power to administer, on the requisition of the voters objecting, the estate is held to be nominal and fictitious; because silence is deemed a

confession, and he must then be struck off the roll.—

Stewart v. Crawford - - - - - p. 203

NOTICE. *Vide* ATTORNEY AND CLIENT. FORFEITURE.

OBLIGATION. *Vide* QUALIFICATION.

PARLIAMENT.

Although an estate should have been created or reserved, in order to enable a party to vote for a member of parliament, yet if it is a real estate, vested in him for his own use and benefit, and if he is under no obligation in point of honour to vote otherwise than his judgment would direct him to vote, the estate is not to be considered as nominal and fictitious.—*Stewart v. Crawford* - 192

Upon the authority of decided cases, these principles are considered as now settled by the law of Scotland; namely, that if an estate be really vested in a person for his own use and benefit, being an estate of a quality to give a vote for a member to serve in parliament, the extent of it is of no consequence; and if *bonâ fide* given without consideration, the fact of its being so given is no objection to the vote.—*Ibid.* - - - - - 193

There is no case in which it has been decided that “if the sensation in the mind of the grantor does not pass to the mind of the grantee, and the sensation in the mind of the grantee does not pass back again to the mind of the grantor,” if there is not an understanding created between them, that the grantee shall vote as the grantor of the estate shall direct him to vote, it will not be a good vote.—*Ibid.* - - - - - * - 193

It has been decided by Lord Thurlow, that he could not hold estates fictitious when the persons voting in respect of them, vote from gratitude or common obligation, but that there must be a sort of paramount and perfect obligation disappointing the law; an understanding, that the grantor created the vote for the purpose of making the grantee his creature, and that the man who took the vote understood that he so took it, and was under a kind of honorary obligation to become the creature of the grantor, who meant to give him the estate, for the express purpose of his voting as he the grantor pleased.—*Id.* - - - - - ib.

PENDICLES. *Vide PRIVILEGES.*

PERJURY:

The doctrine of Lord Thurlow, as to honorary obligation, (to vote for a candidate) depends not upon the oath, but upon the nature of the parliamentary law in Scotland. It would be very difficult to apply to an honorary obligation the words which are contained in the statute (7 Geo. 2, c.) : " In case any person shall presume
" wilfully and falsely to swear and subscribe the said
" oath, and shall be thereof lawfully convicted, he shall
" incur the pains and penalty of perjury, and be pro-
" secuted for the same according to the law and form in
" use in Scotland."—*Stewart v. Crawford* - p. 194

Where an oath is administered to the parties, the grantee may declare upon his oath, that he was not bound, that he would not have taken the estate, if there had been any suspicion that he was bound in honour (to vote as the grantor should direct); the grantor may also declare that there was no such understanding on his part. And if both parties (contrary to the fact) were to pledge themselves by their oaths, that whatever were the language or the appearances, neither the one nor the other had any such intention; that no such understanding or obligation existed; upon the general words of this oath the parties could not be convicted of wilful perjury.—*Id.* - ib.

PERPETUITY. *Vide CONSTRUCTION.*

PLEADING. *Vide NOMINAL AND FICTITIOUS.*

If a pursuer by his summons prays that the defender may execute a draft of a conveyance according to an award, he cannot have a judgment that a draft may be executed according to an agreement, which was the subject of the award; *semb.*

Unless the defender, by his manner of pleading, in his answer waives (if he can do so) the technical objection to the form of the interlocutor, as inconsistent with the summons.—*Paton v. Brebner* - - - - 65

If the pursuer, being respondent in an appeal, and knowing the circumstances, insists, in his case before the House of Lords, that the appellant (defender) has waived the objection, because he finally rested his defence on the

ground that he was required by the respondent to grant certain privileges which were not within the terms or intent of his contract, the respondent cannot ask to have the case remitted to the Court below, upon a question arising out of the reference and award.—*Paton v. Brebner* p. 66

Assuming that the appellant has waived the technical objection, the parties by their own acts have narrowed the matter of controversy to the question upon the previous contract, *i. e.* what conveyance the one was bound to execute and the other to accept, without reference to the award.—*Id.* ib.

Matters which are alleged and not denied, are in Scotch pleadings taken as confessed.—*Stewart v. Crawford*, 201

An offer by the defender to meet the plaintiff, in another action, if he amends his pleading, is not a waiver of the form. (L. R.)—*Hughes v. Gordon* 287

In an action, where the summons concludes for peaceable enjoyment of lands sold, with warrandice or damages in case of eviction, it is in form and substance an action upon the warrandice; and unless the pursuer proves that he is evicted of something expressed or necessarily implied in the warrandice, he cannot recover in that form of action. (L. R.)—*Id.* ib.

Where the form of action is on a warrandice, the question is, whether the thing described in the warrandice is evicted. The conclusion of the summons, with the claim of damages, being in respect of the eviction of the thing warranted, cannot justify a total departure from all forms of action, and a judgment as upon an action *quanti minoris*. (L. R.)—*Ibid.* 313, 314

POLICY. *Vide* PROHIBITION.

POWER. *Vide* ADMINISTRATION. APPOINTMENT. GRASSUM. JURISDICTION. LEASE. PROHIBITION. RENT. TAILZIE.

An heir of tailzie, where there is no prohibition, cannot diminish the rent. *Semb.*—*Queensberry Leases* 407

The best evidence that a man has let for the best and most improved rent is, that he has taken no more for himself than those who come after him.

If the tenant for life, granting a lease under a power, provides for those who are to take after him, as he has provided for himself, this throws a burden on those who mean to quarrel with such a lease, to prove that there was in the transaction that want of ordinary prudence which shows an inattention to the prescribed terms under which he was to let the lease.

Primâ facie, a lease has been always held to be good against remainder-men, which made for them the same provision as for the tenant for life; and in ninety-nine cases in a hundred that is the safe principle of decision.

If the principle of leasing, either under powers of leasing in English deeds, or under the declared right of leasing in Scotch tailzies, does in law depend upon the lease being made with a due and rational attention to the administration of the estate, whatever difficulties there may be in applying that principle, courts of justice must decide the question, whether the lease, or the subject of the power, is made or executed, upon the principle on which the law will decide for its validity.—*Queensberry Leases* - p. 428

If a man has (by an English instrument) a power to grant for ten years, and he grants for twenty-one, the lease, although bad for the twenty-one, will be good (in equity) for the ten, because there both parties have before them a written instrument, which gives the power, and they both know what is the utmost extent for which it can be good.—*Ibid.* - - - - - 437

The want of power in the heir of tailzie of selling woods (to be cut down after his decease) if not considered as an implied prohibition, shows that in such respect he has not the same unlimited estate and power over his lands as an English tenant in fee-simple, or the absolute fiar in Scotland.—*Ibid.* - - - - - 478

The tenant in pure fee (absolute fiar) can sell his wood so to be cut; and this shows that the principle is not generally applied.—*Ibid.* - - - - - ib.

The Scotch heir of tailzie may denude the estate of timber and saplings, and every thing else that should be permitted to grow; he may do all the waste he can in the course of his life. That is what an English tenant in

fee can do, but what a tenant (for life, with remainders to his issue, or strict limitations over) in tail, cannot do.—

Queensberry Leases - - - - - p. 478

Under the permission to lease “without diminution of rental,” an heir of tailzie cannot diminish the rent of farm *A*. though he still preserve the quantum of rent upon the whole, by raising farm *B*. in proportion. *Semb.*—
Ibid. - - - - - 480

Where the author of the tailzie dies in possession of part of the lands entailed, which have never been let at a rent, other part of the estate being in the possession of tenants upon rents, the words “without diminution of rental,” in a power to lease, with respect to that estate, cannot, in the technical sense of the words, mean without diminution of rental, because, according to that construction, the heir of tailzie in possession would be empowered to let the whole estate, including all that part in the natural possession of the entailer, for the rent of that part not in the natural possession of the entailer. He must take the true value of that which was never let before.

The words “without diminution of rental” do not necessarily bear a technical sense.

In order to give a rational construction to those words, the value of that on which there can be no diminution of the rental must be estimated.—*Ibid.* - - - 481

If the land in the natural possession of the entailer had, fifty years before, been let at a rent of 2,000 *l*. the next heir of tailzie, being bound to let without diminution of the rental, and the author having been, during his life, in the natural possession of this part, which was worth 5,000 *l*. a year during his possession, the heir of tailzie could not let such part of the estate at 2,000 *l*. if the value is 5,000 *l*.—*Ibid.* - - - - - 482

The manner in which it is to be discovered whether there is an evident diminution of the rental or not, is not to put upon the heir of tailzie the obligation to see whether there is sixpence abated from the former rental. That is not the meaning of the author of the entail. The words “without evident diminution of the rental,” mean

without diminution of such fair rent as may be obtained.

—*Queensberry Leases* - - - - - p. 482

Where the heir or donee is permitted or empowered to lease, without "diminution of the rental," or for "the best rent," &c. there is no obligation to lease by auction or roup. Upon the execution of the power, if the heir or donee, takes no more for himself than he leaves for his successor, that is presumptive evidence that it is the best rent which can be obtained.

If he is not bound to increase the rent, it is for this reason, that it may be taken, if he does not, to be the just rent.

—*Ibid.* - - - - - 463

Tenant of tailzie in possession (under an entail, prohibiting, &c.) has not power to grant tacks or terms of years, partly for yearly rent, and partly for a price or sum paid to himself; and tacks granted by him upon surrender of former tacks, which had been granted partly for yearly rent, and partly for prices or sums paid to the tenant himself, ought to be considered as partly granted for prices or sums paid to the tenant in possession; and such tacks ought not to be considered as let "without diminution of the rental, or at the just avail," and are therefore to be considered, as between the parties claiming under the entail, as tacks which he had not power to grant by such entail.—*Ibid.* - - - - - 490

Such tenant in tailzie has not power, by the deed of entail, to grant such tacks, upon the surrender or renunciation of former tacks then unexpired, and which former tacks had been granted by the same tenant at the same rent, and also for a sum or price received by him; and such tacks having been granted, partly in consideration of the rent reserved thereby, and partly in consideration of a price or sum before paid, and of the renunciation of the former tack, ought to be considered, in a question with the tacksman, as let with an evident diminution of rental, and not for the just avail.—*Ibid.* - - - - - 491

Such tenant in tailzie has not power, under such entail, to let tacks partly for annual rent and partly for sums and prices paid to himself; and tacks granted upon the resig-

nation of former tacks, which were granted partly for rent reserved, and partly for sums and prices paid to such tenant, are to be considered as tacks made partly for rent reserved, and partly for sums and prices paid to the tenant himself. Such tacks are to be considered, as between the persons claiming under the entail, as tacks partly for rent, and partly for a sum or price paid to the heir in possession, and ought not to be considered, in a question with the tenants claiming under such tacks as let without evident diminution of the rental.—

Queensberry Leases - - - - - p. 491

A power yielded to necessity, and to necessity *only*, ought to be bounded by the necessity which compels it to be yielded; that is, by that which, generally speaking, is compatible with the future as well as with the present enjoyment of the estate. (L. R.)—*Ibid.* - - - 503

PRACTICE. *Vide* JURISDICTION. PLEADING. TEINDS.

If in the Court of Session, upon a question of objection to a claim to be put upon the roll of freeholders, on the ground of nominality, &c. the circumstances fall short of producing a presumption which the parties cannot answer, the Court ought to direct, that the parties should be examined upon interrogatories as to the alleged nominality, &c.—*Stewart v. Crawford* - - - 208

There may be a great deal of practice in transactions of a particular nature, and of understanding, as to the legality or illegality of that practice; and there may be a great deal of decision, where the point decided is not the point in controversy; which understanding and practice is important; and general understanding is important testimony as to what the law is; and the dicta of judges, and what they have taken for granted in decisions not upon the point, are of great weight also as testimony of what the law is; but nevertheless the law may not be as that practice, or that understanding, or those dicta would, *prima facie*, import it to be.—*Queensberry Leases*,

455

Both in England and Scotland it has frequently occurred, that there is a great deal of practice, a great deal of understanding, and many dicta; and yet when the matter

came to be investigated, that practice, that understanding, and those dicta, were found to be without foundation.—*Queensberry Leases* - - - p. 455

So when the Wakefield case was brought into the Court of Session, they decided that their practice, their understanding, and their decisions were wrong. The Court of Session in the first instance, and the House of Lords on appeal, were of opinion, that notwithstanding practice, understanding, dicta and decisions, the law of the land was, that the word “alien” in a tailzie, which had prohibitory, irritant and resolute clauses, did prohibit long leases as alienations.—*Ibid.* - - - - 457

It is evidence of practice and of the law, that in many cases heirs of tailzie are prohibited from letting for grassums.

Those prohibitions are not of very ancient date; but the fact that there are such prohibitions in deeds of tailzie, restraining heirs of tailzie from letting with grassums, is evidence that at the period at which such tailzies were made, and such prohibitions inserted, it was thought necessary there should be such prohibitions, and that an heir of tailzie might let with grassums, provided there was no such prohibition in the tailzie.—*Ibid.* - - - - 463

PRECEDENT. *Vide* AUTHORITY.

PRESCRIPTION. *Vide* ATTORNEY AND CLIENT.

The owner of lands lying very near a public river may be entitled to certain uses of the river, as privileges belonging to the situation; but he cannot have, as privileges belonging to the lands “the privilege and liberty of taking in water from the river, for the purpose of driving machinery, and other uses, and of cutting canals through the grounds, as he shall judge necessary.”—

Paton v. Brebner - - - - 72

PRESUMPTION. *Vide* EVIDENCE.

PRINCIPAL AND AGENT. *Vide* EVIDENCE. **INSURANCE.**

PRINCIPLE. *Vide* AUTHORITY. **JUDGES.**

PRIVILEGES. *Vide* CONTRACT.

The privilege of quarrying stones upon an estate could not belong to land which is other part of the same estate

demised by lease, as a privilege inherent or belonging to the lands so demised.—*Paton v. Brebner* - - - p. 73

The right of cutting a canal through the grounds, is another liberty which could not possibly be inherent in the lands demised.—*Ibid.* - - - - - ib.

PROHIBITION. *Vide* ADMINISTRATION. ALIENATION. CHARGE. CONSTRUCTION. COVENANT. ENTAIL. POWER. PRACTICE. RENT. RENTAL. TAILZIE.

The law, which restrains the leasing of the mansion house and policies, and reserving illusory rent, are instances of implied prohibitions; for the tenant in tailzie (usually) is restricted by no express words in the charter: in such respects, the powers of a tenant in tailzie are limited, and his estate distinguished from that of absolute fiar.—*Queensberry Leases* - - - - - 408

Notwithstanding the stat. 1449, which gives the power by which an effective lease is granted, and the doctrine that nothing is out of the power of an heir of tailzie except what is put out of his power by the intention and meaning of the entail, embodied in actual expression; the case of illusory rent is held to be an implied prohibition, destroying all the effect of strict interpretation. The principle which takes it out of that rule seems to be some important principle arising out of the presumed intention of the author of the tailzie, that this shall not be done, whatever may be the apparent import of the expressions which he has used in his tailzie.—*Ibid.* - - - - - 409

The law which forbids a diminution of the rent is an instance of implied prohibition or non-capacity imposed upon the heir of tailzie, although he is represented as the absolute fiar or manager of his estate—imposed upon him not by the terms of the tailzie, but by the same principle which imposes upon him the restraint not to let leases for ninety-seven or fifty-seven years, or any number of years not of necessary and ordinary administration.—*Ibid.* 476

A diminution of rent is held not to be permitted, unless there is a necessity for such diminution. These opinions rest upon the grounds that such incapacity is imposed upon the heir, not for his own sake, but to preserve a just dealing with the tailzied estate.—*Id.* - - - - - ib.

The heir of tailzie cannot disappoint his successor of the mansion-house and policies, although the author of the tailzie has not prohibited the letting by a single word. The law recognizing them as the residences of the heirs in succession, implies the prohibition.—*Queensberry Leases* - - - - - P. 477

Leases of mansion-houses and policies, if not prohibited by implication of law, would be protected by the act of 1449, under the words by which lands and tenements are protected by that act. But on this account, although they are lands and tenements, that act is not applied to protect them.—*Ibid.* - - - - - *ib.*

PROPERTY TAX. *Vide* CLERGY.

PUBLIC RIVER. *Vide* PRESCRIPTION.

PURCHASE. *Vide* VENDOR AND PURCHASER.

QUALIFICATION. *Vide* NOMINAL AND FICTITIOUS.

If an estate (which confers a qualification to vote for a member of Parliament) can be shown from circumstances, from the refusal of the party to be examined upon interrogatories, or from his deficient answer to those interrogatories, to be an estate not given to him for his own use and benefit, to be used by him as he shall think proper, it is a ground of objection; but if the grantee shall, from the obligation of gratitude, act in the same interest as his friend the grantor, that is no objection.—*Stewart v. Crawford* - - - - - 106

Where a father gives to his son a qualification, or an uncle to his nephew, or a brother to a brother, it is difficult to suppose that the qualification is given by the father, uncle, or brother, without conceiving that the grantee will vote in the same interest with his relative and patron; but authorities prove that there must be something further, that the objector must make out that there is an illegal understanding between the parties.—*Ibid.* - - - - - *ib.*

The honorary obligation is not, according to the opinion of Lord Thurlow and the House of Lords, in *Forbes v. M'Pherson*, the thing prohibited by the oath (prescribed in the statute Geo. 2.) but that kind of understanding, which it is very difficult to prove exists, but which, when

proved to exist, the House of Lords has determined would vitiate the vote, upon the ground that it was not a real but a fictitious estate, that the grantee was bound in honour to make no use of it, and equally bound in honour to re-dispose it, lest he should make use of it.

The honorary obligation, according to this opinion, is made equal to the effect of the ⁸ bath, where the honorary obligation exists, inducing the consequence in law, that the estate was not a real estate, and inducing a further consequence in law, if the estate could not be used, viz. the obligation to re-dispose it.—*Stewart v. Crawford*,
p. 195

RECITAL. *Vide* HUSBAND AND WIFE.

REDEMPTION. *Vide* HUSBAND AND WIFE. MORTGAGE.

Where the mode in which the redemption is limited is by mistake or improper contrivance introduced into the deed, the course of descent and right of redemption is not changed; but in a case where there is no ground to raise such imputations, and the deed is clear and express in its declarations and provisions, the estate must go according to the limitation, and the right of redemption is regulated thereby. (L. R.)—*Jackson v. Innes* - 128

Where the declaration of the uses of a fine refers simply to the operation of the deed as a mortgage—where it is simply a declaration that the money being paid the fine shall enure to the persons who make the mortgage, and there is nothing else which makes it subject to redemption, that would be considered as a mere clause of redemption, and construed in the same way; but where the form of the equity of redemption has nothing to do with the limitation of the estate, where the limitation of the estate is perfectly distinct, the rules which have been established in the cases of resulting trusts do not in any degree apply. (L. R.)—*Ibid.* - - - - - 128

RENEWAL. *Vide* FORFEITURE.

RENT. *Vide* ADMINISTRATION. CONSTRUCTION. GRASSUM.
POWER. PROHIBITION. TEINDS.

Supposing the meaning of the words “without diminution of rental,” to be, that the heir of tailzie must let at the last rent, if there were no such words to be found in the entail as “*the just avail at the time*,” he might lower

the rent, stating a (sufficient) reason. Then supposing, the rent having been lowered, there is a third lease to be granted, what is the rent at which that third lease is to be granted? Is it the rent which was the last rent which had been so lowered, or are you to refer back again to that which was the rent before it was so lowered?

Quære.—*Queensberry Leases* - - - - - p. 454

Where the tenant who held had ceased to hold, and the land was taken into the possession of the landlord himself, and he held it a considerable time; supposing the value of land in the last year in which he so held it was 1,000*l.* a year, and that the actual rent reserved before that landlord took it into his natural possession, was only 500*l.* a year, it was held (in *Elliott v. Curries*) that if the landlord chooses to let it again, he is allowed to let it, not at such a rent as the value at the period of his natural possession would justify, but at the low rent which the land was let for at the time when his holding commenced.

Considering the effect of such a rule, there is reason to doubt the principle on which it stands.—*Ibid.* - ib.

Although there is nothing in the charter (of a Scotch tailzie) that prohibits diminution of rent, if there is nothing in the circumstances of the times which warrants diminution of rent, the heir of tailzie, who cannot grant a long lease, because that is not for necessary and ordinary administration, has no power to diminish the rent.—*Ibid.*

475

The prohibition to alienate, and the principle of law which applies that prohibition to long leases, is equally applicable to prohibit unnecessary and improvident diminution of the rent.—*Ibid.* - - - - - ib.

In one case, diminishing the rent much, is considered as even fraud.—*Ibid.* - - - - - 476

RENT, ILLUSORY. *Vide* PROHIBITION.

RENTAL. *Vide* CROWN LANDS. POWER. RENT.

Cass, stipends, and public burdens, if chargeable on the rental, operate as a diminution of the rental.—*Queensberry Leases* - - - - - 358

RESULTING TRUST. *Vide* HUSBAND AND WIFE. MORTGAGE. REDEMPTION.

In a mortgage, the mere form of reservation of the equity

of redemption is not of itself sufficient to alter the previous title; in such a case (where fraud is out of the question) it is supposed to arise from inaccuracy or mistake, which is to be explained and corrected by the state of the title, as it was before the mortgage. This is conformable to the principle upon which other cases have been determined.

If a lease be made by tenant for life, under a power created by a settlement, and a rent is reserved to the lessor and his heirs, (which is not an unusual blunder) those words are interpreted by the prior title, and applied to such person as, under the settlement, may be entitled to the estate in remainder, and not to the heir of the lessor, unless he happen to be such remainder-man.

In all such cases the words used are to be interpreted according to the title when the instrument is executed.

So where an estate belonging to the wife is mortgaged, and the equity of redemption is reserved to the heirs of the husband, there is a resulting trust for the wife and her heirs. (L. R.)—*Jackson v. Innes* - - - p. 115

REVERSION. *Vide* ENTAIL.

REVERSIONARY. *Vide* LEASE.

SCOTS STATUTES. *Vide* CLERGY. CONSTRUCTION. LEASE.

TAILZIE. TEINDS.

SELL. *Vide* WORDS.

SET OFF. *Vide* DEBTOR AND CREDITOR.

SETTLEMENT. *Vide* HUSBAND AND WIFE.

SHIPS. *Vide* CARRIERS.

SPECIFIC PERFORMANCE. *Vide* AGREEMENT. VENDOR AND PURCHASER.

In a suit in a court of equity in England, for the specific performance of a contract, if it turns out that the defendant cannot make a title to that which he has agreed to convey, the Court will not compel him to convey something less, with indemnity against the risk of eviction; the purchaser is left to seek his remedy at law, in damages for the breach of the agreement.—*Paton v. Brebner*, 66

In a suit for implement (in Scotland), where the summons prays that the appellant may make a feudal title to the lands *and others*, supposing the word *others* to mean

liberties, if he could make a feudal title to all the liberties in question in the cause, it would be exactly like a case in the English courts, where the defendant can make a title, and where he would be ordered specifically to perform his agreement.—*Paton v. Brebner* - p. 67

Where no title can be made, it is the practice of the Court of Session to direct that the vendor shall make a title as far as he can; and for all that is defective, for all such parts of the contract as he cannot specifically perform, they compel him to enter into warrandice, and render himself liable in damages. *Sed quære.*—*Ibid.* - 68

STATUTES. *Vide* CARRIERS. ENTAIL. JUDGES. LEASE.

PERJURY. TAILZIE. WILL.

Whether the act of the 10 Geo. 3. c. 51. relates only to cases of entailed property, where the tailzie contains special clauses limiting the power of granting leases to a small number of years; *Quære.* If it was intended that that act should apply only to such cases, there should have been a provision limiting its operation to such cases.—*Queensberry Leases* - - - - - p. 422

In the statute 10 Geo. 3. c. 51. the legislature had in contemplation the practice of letting under the rent last received; they had in contemplation a species of letting with grassum, fine or foregift; they had in contemplation a letting before the determination of a former lease; and they likewise had in contemplation, that if a man let a lease under this act, before the former lease was expired, and more than one year before the expiration of that former lease, it was an addition to that former lease, which, under the authority of this act, would be void.—*Ibid.* - - 431

The decision in the *Trustees of Sir F. Elliott v. Sir W. Elliott*, that three fourths of expenditure for improvements, to be paid by the succeeding heir out of the rent reserved, over and above grassum, is questionable.

Supposing that decision to be law, the result would be, if a tenant under the tailzie should lay out a large sum of money in improvements, (not exceeding a certain sum, the act 10 Geo. 3. c. 51. puts a limit to the amount of the improvements; but supposing that sum of money to be considerable), and he afterwards lets the estate, getting

a considerable sum as a grassum, in a case where he cannot let with a diminution of the rent, that a person succeeding to the estate is to pay such proportion of those improvements out of the small rent reserved by a man who takes a large grassum. It is difficult to say that such can be the right construction of this act of parliament.—*Queensberry Leases* - - - p. 432

TACITURNITY. *Vide* ATTORNEY AND CLIENT.

TAILZIE. * *Vide* ALIENATION. AUTHORITY. CHARGE. CONSTRUCTION. COVENANT. ENTAIL. GRASSUM. LEASE. POWER. PROHIBITION. RENT. STATUTES.

The Scots act 1685, authorizing certain entails, requires, in order to make them good, at least against claims of third persons, that they should have prohibitory, irritant and resolute clauses; clauses of each of these kinds are necessary to give the effect to those tailzies which this act of parliament intends should be given.

Entails by implication appear to have been intentionally prevented by some of the expressions used in the act of parliament.

If there be no prohibition to sell, annailzie and dispone, a prohibition to make any deed by which persons might be evicted has been held insufficient.

So it has been decided in the case of other implications, that the prohibitions from which they appear to arise, by necessary consequence would not deprive the heirs of tailzie of power over the estate as to matters not expressly prohibited.

Unless there is a prohibition of each sort, the heir of tailzie is free to take advantage of the omission. Where, for instance, the prohibition is not to alter the succession, that would not prevent a sale by the heir. If the clause *de non alienando* fail, the acts prohibited not being stated again in the irritant clauses, as acts that are prohibited, they are not effectually prohibited.

If the clauses are not complete, the frame of the tailzie would not be sufficient to protect those who are to take under it. In some decisions this sort of construction has been carried to a surprising length: but the law as set-

- bled by decisions, though surprising, is not to be altered by courts of justice.—*Queensberry Leases* - p. 344
- Whether entails before the stat. 1449 are to be considered as odious or not, or whether the statute of 1685 is or is not to be considered as purging them of all odious qualities, it is clear that if the statute of 1685 authorizes the entail, and if the entail, by force of that statute, prohibits a tack of fifty-seven years as an alienation, the statute of 1449 cannot prevent the effect of the statute of 1685. The statute of 1449 does not afford any objection to the conclusion of law.—*Ibid.* - - - - - 395
- A tenant in tail in England has an estate that may endure for ever; an heir of tailzie in Scotland is the absolute fiar of the estate—the whole fee is in him for the time. Those who may take after the heir of entail (in possession) in England, are considered as being remainder-men, having part of that fee which is vested only between the English heir of entail and the remainder-man.
- Since the whole fee, after the heir of tailzie is served heir, is in that heir of tailzie for the time being, there is no principle (but the necessity of due administration) on which a lease beyond nineteen years can be held bad, and a lease of nineteen years good.—*Ibid.* - - - 419

TAXES. *Vide.* CLERGY.

TEINDS :

According to the law of Scotland, as it existed formerly, in calculating the teinds, the estimate was made by looking only at the rent reserved, and no benefit was given in that valuation to those who were entitled to the teinds, with respect to any grassums that had been taken; but at a period long subsequent, the Court of Session having reconsidered the statutes, with reference to this matter of teinds, put a construction upon the words, “the rents of lands constantly paying,” and held under these words, that a grassum was worth so much, with reference to the calculation of rent, and that instead of estimating the teinds by the rent reserved, they would take a proportion of the grassum, though the land did not constantly pay that grassum, and consider as the rent,

not the rent which the land constantly paid, but the rent which they thought in justice they ought to consider it as paying between the persons entitled to the teinds and the landholder.

Whether the Court of Session, after their predecessors, for nearly a century together, had said that the statute afforded the rule, and the words were what they were to go by, could give a construction which the words do not bear, in order to reach the justice of the case, *quære*.—

Queensberry Leases - - - - - p. 393, 394

From a particular period, long before the year 1600, and down to the year 1732, it was the constant doctrine, and the uniform decision of the Courts of Scotland with respect to teinds, that they were to be valued upon the rent constantly paid, and without reference to grassums taken by the person to whom that rent was constantly paid.—*Ibid.* - - - - - 456

Yet in the year 1732, the Court of Session itself decided, that all this practice, and all these decisions, were not according to the law of Scotland.—*Ibid.* - - - ib.

TERM OF YEARS. *Vide* HUSBAND AND WIFE.

TITLE. *Vide* RESULTING TRUST.

VALUE. *Vide* RENT.

VENDOR AND PURCHASER. *Vide* CONTRACT. SPECIFIC PERFORMANCE.

If a vendor agrees to make title to appurtenances and privileges, which do not belong to lands sold, his obligation rests only in covenant and agreement.—*Paton v. Brebner*,
 . 65

It is the settled doctrine of English law, that if a lease be made of a house or an estate, the lessor having no title, and the instrument by which the lease is made, contain nothing more than words of demise, with a general covenant that the lessee shall enjoy the premises (that is as long as the relation of lessee and lessor continues): in such a case the lessee does not usually look into the lessor's title, but he takes a covenant, which binds the lessor that he shall have the enjoyment of the thing demised.

If that lessee afterwards becomes the purchaser of the inheritance of the estate, the consequence is, that hav-

ing assumed the character of vendee, it becomes his duty to call upon the vendor to show that he can make a title to the inheritance, and as vendee he must investigate that title, which he takes or refuses, as he may be advised, from the person who, as lessor, had entered into an absolute covenant for his enjoying the premises in the relation of lessee; he can have no covenants, except such as belong to the title and interest vested in the individual, who, ceasing to be lessor, takes upon himself the new character of vendor.

If he claims his estate under a will, the vendor covenants only against the acts of his deviser and himself. If he claims by descent, his covenant is adapted to that species of title; but inasmuch as he and those under whom he claims had taken the title at the hazard of limited covenants, he transmits the estate and title, with such limited covenants, from himself; and the relation of vendor and vendee, when acquired by conveyance of the inheritance, puts an end to the covenants, though ever so large and general, which existed between lessor and lessee.—

Paton v. Brebner - - - - - p. 68, 69

There may be special agreements which might entitle the vendee to call for much larger covenants than those to which he is entitled under ordinary contracts; but according to the established principles of the law, unless there be such explicit terms in the contract, giving more than ordinary covenants, he is not entitled, in his relation of vendee, to covenants so express as those which he had in his relation of lessee.—*Ibid.* - - - - - 69

Where a lessor warrants a privilege, which perhaps he cannot secure, and for the failure of which he must be answerable in damages if the lessees are disturbed in their enjoyment; if the inheritance has been purchased by the lessee, such a purchase may be so managed as to prevent a merger of the lease, but in the absence of special provision there will be a merger of the lease, and the lessee having become the purchaser, in law, has taken upon himself all the obligations by which the former owner of the inheritance had bound himself to his lessee; in other words, the *quondam* lessee, in his new character

of purchaser, would be the person to warrant to himself the liberties and privileges which the former lessor had agreed to assure to him as long as the old relation of lessor and lessee continued.—*Paton v. Brebner* - p. 75

The vendor may concede the advantage, which, by law, he derives from the new relation of vendor and vendee, and as the purchase was a matter of option, the vendor may warrant, at the risk of any damages which could be recovered against him, those liberties and privileges which he, as lessor, had agreed to give the lessee. But according to all laws which rest on principle, such a contract between vendor and vendee must be expressed in terms which are free from all doubt or ambiguity. The terms of a contract so special must indicate unequivocally what was the intention of the parties.—*Ibid.* - - - - - 76

Upon a contract for purchase of the inheritance, the parties may, by the specialties of their contract, preclude the application of that rule which governs such transactions between the vendor and vendee of an inheritance, that the vendee takes upon himself the relation of the vendor with respect to lessees, and as to the claims which the vendor had created, if the terms of the agreement expressly shut out the application of such a rule to the case.—*Ibid.* - - - - - 83

The sale of a superiority of a 40 s. land, of old extent, with warrandice, does not necessarily imply a warranty of a freehold qualification. (L. R.)—*Hughes v. Gordon* - - - - - 287

VOTE. *Vide* FRAUD. QUALIFICATION.

VOYAGE, CHANGE OF. *Vide* INSURANCE.

WARRANDICE. *Vide* CONTRACT. PLEADING. SPECIFIC PERFORMANCE. VENDOR AND PURCHASER.

WARRANTY. *Vide* ENTAIL. VENDOR AND PURCHASER.

WAIVER. *Vide* PLEADING.

WAYGOING CROP. *Vide* CUSTOM.

WILL. *Vide* ELECTION.

Where a will has made the land personal estate, and in one part of that will the land is disposed of, and in

another part the personal estate, if the will is not executed according to the statute, it is no will of land; but as a bequest of personalty does not require attestation, the will is good to that extent.

WORDS. *Vide* ALIENATION. CLERGY. CONSTRUCTION. CROWN LANDS. PRACTICE. TEINDS.

The word "sell" imports a gratuitous donation.—*Queensberry Lessee* - - - - - p. 361

The words "annuize" and "dispone" being coupled in sense are equivalent.—*Ibid.* - - - - - *ib.*

END OF VOL. I.
